IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1793

WINFIELD L. ROBERTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

Counsel for Petitioner
Winfield L. Roberts

May 1979

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

WINFIELD L. ROBERTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Winfield L. Roberts seeks relief from this Court on the sole issue of whether his sentence was influenced by an improper factor not authorized by this Court's recent decision in *United States v. Grayson,* 438 U.S. 41 (1978).

The judgment of the court of appeals was entered on September 22, 1978, and a Suggestion for Rehearing *En Banc* was filed on September 28, 1978. By order dated February 23, 1979, the Court sua sponte vacated its judgment and issued an amended judgment which

affirmed its prior judgment in all respects except that it vacated the District Court's imposition of a special parole term on Petitioner. The Suggestion for Rehearing *En Banc* was denied on April 30, 1979, a majority of five judges not voting to rehear the case. Although the Suggestion was denied, two judges of the Court wrote opposing statements as to why rehearing *en banc* was appropriate, *vel non.*[1] The time within which to file a petition for a writ of certiorari extends to and including Wednesday, May 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In light of this Court's recent opinion in *United States v. Grayson,* 438 U.S. 41 (1978), may a trial judge take into account and consider as a sentencing factor the failure of petitioner to become a government informant in imposing maximum consecutive sentences upon him?

STATEMENT

Petitioner was indicted in a five count indictment including one count of conspiracy and four counts charging unlawful use of a telephone to facilitate the distribution of heroin. 21 U.S.C. 841(a), 846, 843(b). In 1975, he pleaded guilty to the conspiracy count and

[1]The history of the case as above outlined appears in the order of April 30, 1979, reproduced App. A, *infra,* p. 1a.

received a sentence of four to fifteen years imprisonment, a three year special parole term, and a $5,000 fine. The court below vacated the conviction in 1977 because the Government had not fully disclosed the details of the plea agreement to the District Court. *United States v. Roberts,* 570 F.2d 999 (D.C. Cir. 1977). Upon remand, petitioner pleaded guilty to two of the four counts of unlawful use of a telephone which carried a maximum penalty of four years imprisonment and a $30,000 fine on each count. He was given maximum four year consecutive sentences totalling two to eight years imprisonment and a three year term of special parole.[2]

At the threshold we want to demonstrate that the record is unequivocal to the effect that the district judge relied on Petitioner's failure to cooperate and become a government informant as *a factor* in imposing maximum consecutive four year sentences upon him.

Prior to sentencing in a written memorandum and orally at sentencing, counsel for Petitioner sought a concurrent sentence on the two phone counts because his client had already been incarcerated for over two years at the federal penitentiary in Atlanta, and because custom and practice in the courthouse appeared to require it.

> "[Counsel for Appellant]: [W]hen you have a plea on two counts such as this, Judges uniformly, in my experience at least, give concurrent sentences as a matter of course. In fact I know of no case in this courthouse, and I think [the prosecutor] and [the probation officer] can corroborate this if I

[2]As indicated earlier, this three year special parole term was vacated by the Court below.

am in error, or contradict it, in which a judge of this Court ever gave consecutive sentences for two phone counts . . . I have checked all the advance sheets, and I don't know how many dozens of cases I've read, including the Federal Reporter. I have found no cases, as a matter of fact, in which any federal judge has ever given consecutive sentences for two or more phone counts." (Sentencing Tr. 4-5)

The prosecutor conceded the rarity of consecutive sentences in these circumstances:

"Your Honor, [Defense counsel] has more or less, found that the Government, by asking for consecutive sentences, is going against a rule of general usage, of customary practice in this courthouse. To some extent that is correct, because generally speaking in the pleas that I have handled in cases like this over the years, I haven't always been as harsh in asking for a particular sentence as I am in this case and I would like to explain why the Government has taken this reason, so as not to appear as a Simon Legree." (Sentencing Tr. 12)

The prosecutor then went on at length to explain the primary basis for his extraordinary request of maximum consecutive sentences for Petitioner, *i.e.*, the fact that the latter had refused to cooperate and become an informant.

"Throughout the long process that has occurred from June of 1975 when he first came into my office, up to today, he still has refused to cooperate." (Sentencing Tr. 12.)

* * *

"Your Honor, when you take into account the seriousness of this offense . . . , where he refused

to assist the Government and thereby brought down on his head charges much more severe than would have been brought down, it's the Government's feeling that the appropriate sentence in this case is as we suggested." (Sentencing Tr. 16)

* * *

"[D]espite repeated entreaties to secure his cooperation to go that extra step, he adamantly refused." (Sentencing Tr. 14)

The Court in imposing sentence clearly relied on this lack of cooperation—so prominently advanced by the Government—as a factor in meting out punishment.

"The Court: Mr. Roberts, we have considered your case very carefully. We have noted again you were on parole from a bank robbery conviction, which you have had prior involvement with the law. In this case you were clearly a dealer, but you had an opportunity and failed to cooperate with the Government. Accordingly, it is the judgment of the Court that on each of these two counts you be sentenced to a term of one to four years, that those counts be consecutive, and in addition that there shall be a three-year term of special parole. We are not imposing a fine." (Sentencing Tr. 19)

In addition, in denying bond pending appeal by written memorandum the district judge again alluded to this lack of cooperation as a factor in the denial.

"Defendant Roberts previously declined to testify against his codefendant Thornton and, despite his plea of guilty, continues to refuse to identify his own sources of supply for heroin." (Page 2)

A clear indication that the Court would ameliorate Petitioner's lot if he began to cooperate and, no doubt, would still do so this very day.

Furthermore, we are not alone in our understanding of the record, being strongly supported in our view of it by the Government's brief on appeal.

> "The sentence imposed on appellant was legal. The trial court was entitled to consider appellant's failure to cooperate with the Government as one factor in its sentencing determination." (Br. 7)
>
> * * *
>
> "We submit that cooperation with law enforcement officials is a factor which clearly bears on appellant's rehabilitative prospects and may properly be considered by the sentencing judge." (Br. 20)
>
> * * *
>
> "The court . . . cited this lack of cooperation, along with appellant's prior convictions and the fact that he was a drug dealer, as the reasons for imposing consecutive sentences." (Br. 22)
>
> "[A] defendant's failure to cooperate indicates his resistance to rehabilitation and counsels against mitigation of his punishment." (Br. 22)

The Court of Appeals rejected our claim in a cursory order entered on September 22, 1978.

REASONS FOR GRANTING THE PETITION

The imposition of heavier sentences and the lure of reduction of sentences based upon lack of cooperation versus cooperation with the Government is an ongoing fact of life in the trial courts which should be abolished. Prosecutors aided by some sympathetic judges are—in these circumstances—coercing defendants to give up their Fifth Amendment rights against self-incrimination and thereby nullifying the benefits to

be accorded defendants pursuant to immunity statutes. See 18 U.S.C. §6002 (1976). Furthermore these practices place intolerable burdens on someone like petitioner because, in drug cases, informants necessarily place the lives of themselves and their families in jeopardy. Prosecutors everywhere consistently argue against disclosure of informers identities, especially in narcotic cases, because disclosure would often lead to violent retaliation. In these circumstances it is aborhent to permit a judge to consider lack of cooperation as a factor in the sentencing determination.

United States v. Grayson, 438 U.S. 41 (1978) was urged below as governing the instant case. Whereas Grayson chose to lie in court and received an enhanced penalty therefore, Petitioner was more severly punished for literally doing nothing in a situation where he was not required to nor did he have a duty to act. Upon even casual analysis, *Grayson* is neither controlling nor analogous to the case at bar.

Furthermore, as revealed in the Statement of Judge Bazelon as to why he voted to rehear the case *en banc,* the issue presented herein has been resolved differently between the Circuits. Resolution of that conflict is a demanding reason for this Court to issue the writ requested.

> "Other circuits have addressed this or similar questions and have differed in their conclusions. *Compare United States v. Garcia,* 544 F.2d 681, 684-86 (3d Cir. 1976) (improper factor in sentencing); *United States v. Rogers,* 504 F.2d 1079, 1084-85 (5th Cir. 1974) (same); *with United States v. Vermeulen,* 436 F.2d 72, 76-77 (2d Cir. 1970) (proper factor in sentencing), *cert. denied,* 402 U.S. 911 (1971); *United States v. Chaidez-Castro,* 430 F.2d 766, 770-71 (7th Cir. 1970) (same)." (Statement of Judge Bazelon App.6a n. 7.)

CONCLUSION

The petition for a writ of certiorari should be granted to preserve the fairness of the judicial process.

Respectfully submitted,

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
Counsel for Petitioner
Winfield L. Roberts

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1428

UNITED STATES OF AMERICA

v.

WINFIELD L. ROBERTS, a/k/a WIN, APPELLANT

Before: WRIGHT, *Chief Judge*, and MACKINNON, *Circuit Judge*, and AUBREY E. ROBINSON, JR.,* United States District Judge for the United States District Court for the District of Columbia

---

Filed September 22, 1978

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

The duty of counsel is fully discharged without filing a suggestion for rehearing *en banc* unless the case meets the

---

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

rigid standards of Federal Rule of Appellate Procedure 35(a).

Per Curiam

Filed February 23, 1979

ORDER

IT IS ORDERED, by the Court, sua sponte, that the Judgment previously entered in this proceeding on September 22, 1978 be, and it is hereby, vacated.

Per Curiam

Filed February 23, 1979

AMENDED JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgment of the District Court appealed from in this cause, only insofar as it imposed a three-year special parole term on appellant, is vacated; but in all other respects that judgment is affirmed.

The duty of counsel is fully discharged without filing a suggestion for rehearing *en banc* unless the case meets the rigid standards of Federal Rule of Appellate Procedure 35(a).

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1428

UNITED STATES OF AMERICA

v.

WINFIELD L. ROBERTS, a/k/a WIN, APPELLANT

On Suggestion for Rehearing En Banc

(D.C. Criminal 75-619)

Filed April 30, 1979

Before: WRIGHT, *Chief Judge;* BAZELON, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB, and WILKEY, *Circuit Judges*

ORDER

The suggestion for rehearing *en banc* filed by appellant Winfield L. Roberts, having been transmitted to the full Court and a majority of judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc*, that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

Statement of BAZELON, *Circuit Judge*, as to why he voted for rehearing en banc.

Separate Statement by *Circuit Judge* MACKINNON.

Statement of BAZELON, *Circuit Judge, as to why he voted for rehearing en banc.*

The District Court in this case imposed substantial and consecutive sentences upon appellant because he refused to name the persons who had supplied narcotics which he distributed. A panel of this court affirmed appellant's conviction and sentence without opinion or memorandum. This appeal presents the question whether a trial judge may properly consider a defendant's failure to cooperate with law enforcement officials as an aggravating circumstance warranting imposition of an enhanced sentence. Because the panel failed to address this difficult issue which is critical to the fair administration of criminal justice, I voted to rehear this case *en banc*.

I.

Appellant was indicted in a five count indictment including one count of conspiracy and four counts charging unlawful use of a telephone to facilitate the distribution of heroin.[1] In 1975, he pleaded guilty to the conspiracy count and received a sentence of four to fifteen years imprisonment, a three year special parole term, and a $5,000 fine. This court vacated appellant's guilty plea and sentence in 1977 because the Government had not fully disclosed the details of the plea agreement to the District Court.[2]

[1] *See* 21 U.S.C. §§ 841(a), 846 (1976); *id.* § 843(b).

[2] *United States v. Roberts*, 570 F.2d 999 (D.C. Cir. 1977).

After several unsuccessful attempts to disqualify the original trial judge from the case on remand,[3] appellant pleaded guilty to two of the four counts of unlawful use of a telephone. Prior to sentencing, appellant filed a motion requesting that the sentences on the two counts run concurrently, which apparently is the customary practice in the District Court.[4] The prosecutor in his allocution, however, asked the sentencing judge to impose consecutive sentences of substantial weight. The judge responded by imposing consecutive sentences of one to four years on each count, plus a three year term of special parole.[5] The maximum penalty provided in the relevant statute is imprisonment for four years, a fine of $30,000,

[3] Appellant filed a motion for recusal in the District Court and a petition for writ of mandamus in this court.

[4] *See* Brief for Appellant at 21 n.6; Brief for Appellee at 26 & n.15. During the sentencing proceedings, defense counsel indicated that he could find no case in this or any other circuit in which a defendant had received consecutive sentences for multiple counts of unlawful use of a telephone. *See* Sentencing Tr. at 4-5, reproduced in part in Appendix, *infra*. The prosecutor conceded the rarity of consecutive sentences on these counts but emphasized that the Government's somewhat extraordinary request was based primarily upon the defendant's refusal to identify his suppliers during the plea bargaining process. *See id.* at 12-14, 16. Given both the thrust of the Government's allocution and the trial judge's specific admonishment from the bench during sentencing ("you had an opportunity and failed to cooperate with the Government," *id.* at 19), the record on appeal clearly demonstrates that the defendant's failure to cooperate was a significant factor affecting the sentence imposed. Whether it was the sole factor is irrelevant. The question is whether it is ~~an appropriate~~ a permissible factor.

[5] The District Court imposed a ~~three-year~~ special parole term which was not authorized by the statute, 21 U.S.C. § 843(b). The Government conceded that this part of appellant's sentence should be vacated. *See* Brief for Appellee at 24 n.13. The panel vacated the unauthorized condition by order dated February 23, 1979.

or both.[6] In the present appeal, a panel of this court affirmed by order. This petition for rehearing *en banc* followed.

II.

The primary issue on appeal is simply whether a trial judge may properly rely upon the fact that a defendant refused to become an informer as a justification for imposing a more severe sentence. In our own circuit we have touched upon this issue without squarely confronting it on at least two prior occasions, and with differing results.[7] In *United States v. McCord*,[8] we suggested that a trial judge's consideration of defendant's failure to cooperate might necessitate vacation of sentence. Only a short time later, in *United States v. Liddy*,[9] a different panel concluded that that same factor was properly considered in imposing sentence. I think the present case offers an appropriate forum for *en banc* consideration of this troublesome issue.

The Government urges that *United States v. Grayson*, 438 U.S. 41 (1978), resolves the question whether the sentencing judge may properly consider the defendant's

---

[6] 21 U.S.C. § 843(c) (1976).

[7] Other circuits have addressed this or similar questions and have differed in their conclusions. *Compare United States v. Garcia*, 544 F.2d 681, 684-86 (3d Cir. 1976) (improper factor in sentencing); *United States v. Rogers*, 504 F.2d 1079, 1084-85 (5th Cir. 1974) (same); *with United States v. Vermeulen*, 436 F.2d 72, 76-77 (2d Cir. 1970) (proper factor in sentencing), *cert. denied*, 402 U.S. 911 (1971); *United States v. Chaidez-Castro*, 430 F.2d 766, 770-71 (7th Cir. 1970) (same).

[8] 509 F.2d 334, 346 n.35 (D.C. Cir. 1974).

[9] 397 F. Supp. 947 (D.D.C. 1975), *aff'd without opinion*, 530 F.2d 1094 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 937 (1976). This court's disposition was set forth in an unpublished memorandum.

failure to cooperate with law enforcement officials. The Supreme Court held in *Grayson* that a sentencing judge, in fixing sentence within the statutory limits, may properly consider that a defendant gave false testimony during trial. The Court concluded that a defendant's willingness to commit the serious crime of perjury "may be deemed probative of his prospects for rehabilitation," *id.* at 52, and thus was a relevant factor in sentencing under the current rehabilitation model. Yet, at least without further explanation, *Grayson* does not appear to govern the situation in the present case. First, the Supreme Court emphasized that a defendant's deliberate choice to commit perjury—"a manipulative defiance of the law"[10]—accurately indicated the likelihood of future transgressions and the degree to which defendant was "at war with his society." *Id.* at 51. Second, the Court rejected Grayson's constitutional arguments about "chilling" defendant's right to testify by asserting that there is no protected right to testify untruthfully. In this case, by way of contrast, appellant Roberts' conduct was not similarly antagonistic. Appellant did cooperate with authorities with respect to the crimes charged in this indictment by inculpating both himself and his coconspirator. Appellant balked only when asked to identify his powerful suppliers, fearing that to do so would endanger his life and possibly incriminate himself in additional conspiracies or criminal activities without benefit of immunity from prosecution. Whereas Grayson chose to lie when he had a legal duty to tell the truth, Roberts simply chose not to act in a situation in which he had no affirmative duty to act.[11] And whereas Grayson had no

---

[10] 438 U.S. at 51 (quoting *United States v. Hendrix*, 505 F.2d 1233, 1237 (2d Cir. 1974)).

[11] Roberts' case differs from that in which a person has a duty to *testify*. *Compare In re Grand Jury Proceedings*, 509 F.2d 1349, 1350-51 (5th Cir. 1975) (proper to compel testimony before grand jury after grant of immunity), *with*

protected right to commit perjury, Roberts did have a constitutionally protected privilege against self-incrimination—a privilege that Congress intended to safeguard by requiring the Government to grant immunity before compelling self-incriminating testimony. *See* 18 U.S.C. § 6002 (1976).

The panel's apparent extension of the *Grayson* rationale without further elaboration is particularly disturbing here, for the result in this case permits the prosecution to increase its leverage in the "bargaining process" with the defendant by calling upon the considerable influence of the trial judge. The trial judge, whose impartiality is a cornerstone of our criminal justice system, may be tempted, under the guise of exercising discretion in sentencing, to join forces with the prosecutor in securing the defendant's cooperation. Although the judge's consideration of the defendant's cooperation may be justifiable on other grounds, this practice should be reconciled with this court's earlier pronouncement that "the trial judge should neither participate directly in plea bargaining nor create incentives for guilty pleas by a policy of differential sentences . . . ." *Scott v. United States*, 419 F.2d 264, 274 (D.C. Cir. 1969) (opinion of Bazelon, C.J.); *see id.* at 279 (opinion of Wright, J.).

Before he was formally arrested, Roberts was told by the prosecutor "that the nature and extent of his cooperation would be determinative of the charges which could be brought against him."[12] When Roberts nonetheless refused to name his suppliers of narcotics, he was arrested and indicted accordingly. After his indictment Roberts again refused to cooperate. The Government

United States v. Rogers, 504 F.2d 1079, 1084-85 (5th Cir. 1974) (improper to enhance sentence based on defendant's failure to cooperate with prosecution).

[12] Government's Memorandum on Sentencing at 6 (filed in D.D.C. on Mar. 25, 1976).

In his separate statement, Judge MacKinnon notes that if judges in sentencing are not permitted to consider the extent of the defendant's cooperation with law enforcement officials, then prosecutors will simply take this factor into account in determining what charges to bring. In this case, however, the defendant's failure to cooperate was a factor affecting *both* the charges of the indictment and the sentence.

Just as the trial judge's extremely broad sentencing discretion has precipitated a spate of proposals calling for sentencing reform, the prosecutor's unbridled discretion in charging and bargaining with defendants has become the focus of increasing concern and debate within the field of criminal justice administration. Several commentators have suggested that the breadth of prosecutorial discretion must be curtailed in order to avoid the injustice engendered by the unfettered and generally unguided exercise of that awesome power. *See, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188-214 (1969); F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969); Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 563-77 (1978); National Advisory Commission on Criminal Justice Standards and Goals, REPORT ON COURTS (1973); Parnas & Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULL. 101 (1978); Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 681; White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971).

Recent proposals have included demands for the outright abolition of plea bargaining, legislative limits on the scope of the prosecutor's authority to bargain with defendants in certain situations, and the formulation of purely advisory and flexible internal guidelines on the prosecution's charging policy and practices. Other suggestions would require the prosecutor to publish reports, much like the one issued by the Watergate Special Prosecutor's Office, publicly disclosing how and why its discretion was exercised in a given case. *See* Report of the Watergate Special Prosecution Force 34-49 (Oct. 1975). In a similar vein, this court has emphasized that decisions such as whether and with what crime to charge the defendant "should be made in the sunlight, and not in the shrouded mist of unguided prosecutorial discretion." *Scott*

could then have attempted to secure such information through a grand jury investigation, using the statutorily prescribed means for compelling testimony without violating defendant's privilege against self-incrimination.[13] Rather than following this course, however, the prosecutor allocuted for a substantial sentence in order either to induce cooperation after defendant's indictment and plea of guilty, or to punish the defendant for noncooper-

---

v. United States, *supra*, 419 F.2d at 278 (Opinion of Bazelon, C.J.). *Cf. Blackledge v. Allison*, 431 U.S. 63, 76 (1977).

The precise question posed by this case is whether, in imposing sentence, the *trial judge* may consider the defendant's failure to cooperate as an aggravating circumstance. As Judge MacKinnon notes, however, the decisions of the *prosecutor*, no less than those of the judge, may in fact control the ultimate disposition of a case. Thus, if the defendant's failure to cooperate is an impermissible consideration in sentencing, then the question arises whether the prosecutor may properly invoke this consideration in exercising his discretion in charging and bargaining over dispositions.

[13] 18 U.S.C. §§ 6002, 6003 (1976).

Judge MacKinnon implies that a grant of immunity under 18 U.S.C. § 6001 *et seq.* is analogous to the plea bargain, in that both compensate the defendant in exchange for cooperating with the State. But this characterization of immunity is inaccurate: unlike the plea bargain, immunity is not a "reward" for voluntary cooperation with law enforcement officials. Rather, immunity reflects congressional recognition that the Government cannot compel the cooperation of an unwilling defendant unless it safeguards his constitutional right against self-incrimination. *Brady v. United States*, 397 U.S. 742 (1970), recognized that the prosecutor may attempt to secure the defendant's voluntary cooperation by bargaining over indictments and pleas. If these efforts fail, however, Congress, by authorizing a grant of immunity, has provided a means of compelling the defendant's cooperation without sacrificing his constitutional rights. Indeed, one might argue that the immunity statute prescribes the sole avenue of compelling such testimony, and that other means—such as threatening to enhance the defendant's sentence if he fails to cooperate—are impermissible.

ation. The sentencing judge's presentation from the bench of this bargain-versus-retaliation option seems to threaten the "relatively equal bargaining power" between the prosecution and defense that is crucial to the entire concept of plea bargaining.[14] This "announced policy of differential sentencing" [15] raises the serious danger that future defendants may be punished by the sentencing judge if they do not accept the prosecutor's offer during the period of "bargaining" over indictments and pleas. By allowing the judge to take sides with the prosecutor, we may be leaving defendants with a choice between accepting whatever offer is presented to induce them to talk, or being punished for exercising their right to remain silent.

---

[14] *Parker v. North Carolina*, 397 U.S. 790, 809 (1970); *accord, Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978).

[15] *Scott v. United States*, 419 F.2d at 274.

APPENDIX

Sentencing Transcript

* * * *

[pp. 4-6]

MR. PALMER [Counsel for defendant]:

* * * *

Aside from the legal argument, Your Honor has a lot of experience in criminal cases, more than I do—I have a fair amount, also. I think it fair to say in my experience that when you have a plea on two counts such as this, Judges uniformly, in my experience at least, give concurrent sentences as a matter of course. In fact I know of no case in this courthouse, and I think Mr. McSorley and Mr. Connor can corroborate this if I am in error, or contradict it, in which a judge of this Court ever gave consecutive sentences for two phone counts. In fact the case that I had once, Ramsey v. U.S., which went to the Supreme Court, Judge Smith, there too on several phone counts, gave concurrent sentences. I have checked all the advance sheets, and I don't know how many dozens of cases I've read, including the Federal Reporter. I have found no cases, as a matter of fact, in which any federal judge has ever given consecutive sentences for two or more phone counts.

I think based on that, based on the policy or usual procedure in this courthouse, we think it only fair, both under the law and the fact, that concurrent sentences be imposed, and I sincerely urge that.

All right. Now, without getting into that issue, the question of sentencing now comes up, and I really want to get into this a bit because of the Government's now famous allocution in the matter. We know that during

the course of this investigation there was this phone tap directed at Boo Thornton for a couple of weeks. As a result of that I believe six search warrants were executed for gambling and narcotics as a result of Mr. Thornton's activities, people arrested, et cetera. At that time no one knew Winfield Roberts from anybody else.

During the course of the investigation, I think on three occasions a green Jaguar was seen in the vicinity. The girl that owned it, Cecelia Payne, came in and said, "Yes, it's my car, I loan it to my boyfriend. He's sitting outside." "Who's the boyfriend?" "Winfield Roberts."

The Government attorney and the other policemen were there, and there was a bit of disbelief over their good fortune. In any event Winfield Roberts comes in. Mr. Roberts made a statement to the police at the time.

Now, during the conversations alleged between this man and Thornton, the term "street" and "half street" were used relative to narcotics. All right. They asked Mr. Winfield Roberts about it, and he said, "Yes". I have a copy of his statement, which was given to me by Mr. McSorley. They asked him if he knew what was meant by the term "street" and "half street", because it was on the tape, and he said that "street" meant a $100 bag, and "half street" meant a $50 bag. He stated that when Boo was short on drugs he would make these deliveries to Boo in the amounts of 50 and $100 bags.

The target, Mr. Thornton, was indicted for gambling, I think, and narcotic violations, which he pled to some and the Government dismissed as to others. Mr. McSorley files his well-known allocution. I don't know if Judge Corcoran might have overreacted to it or what, but in any event he placed Mr. Thornton, the target, on probation in the matter.

Then we get here to Mr. Roberts. His case comes to Court, they indicate to him "If you testify against Thorn-

ton, or help us with who gave you the drugs, whatever, we'll go light on you." He says, "I wasn't involved in it," he refuses. He winds up with a substantial sentence, which he, Mr. Roberts, was somewhat surprised at, considering the course of events.

* * * *

[pp. 11-19]

MR. McSORLEY [Prosecutor]: Your Honor, I would like to reply to some of Mr. Palmer's remarks.

The Government in this case, because we had filed previously a very lengthy allocution, felt no need to supplement it with any extended pleadings. Consequently we filed only a two-page document with our sentencing recommendation that the Court impose consecutive sentences, on the basis of his factual pleas of guilty to two counts of using a telephone to facilitate a violation of the Controlled Substances Act.

In short, we have asked Your Honor to impose sentences of 16 to 48 months on each count, consecutively, which would mean, of course, a total of 30 to 96 months. Because the defendant has already served 21 months in prison, and would get credit for time served, the net result, if the Court were to accept our recommendation, would be that the defendant, if he goes back to a federal institution, would have to serve 11 months from today, generally speaking, before he becomes parole eligible.

This sentence that we're asking for is much less severe than the one the Court imposed on him two years ago when it meted out a sentence of four years to 15 years. There the minimum time he would have had to serve was 48 months. In the instant case if the Court were to adopt our recommendation because of the time served it would be 11. So it would come out to be practically 16 months less time that he would end up serving if the sentence of two years ago were to be compared with the sentence we ask the Court to impose today.

Your Honor, Mr. Palmer has more or less found that the Government, by asking for consecutive sentences, is going against a rule of general usage, of customary practice in this courthouse. To some extent that is correct, because generally speaking in the pleas that I have handled in cases like this over the years, I haven't always been as harsh in asking for a particular sentence as I am in this case, and I would like to explain why the Government has taken this reason, so as not to appear as a Simon Legree.

Many, many months ago when this case first began and we had no idea of the identity of who it was who was using that green Jaguar automobile to ferry narcotics about the city, we subpoenaed the owner in, and that turned out to be Cecelia Payne, Mr. Roberts' girlfriend. She came in and she confirmed in fact that she was the owner, and the only person she ever let drive that car was her boyfriend, whose name was Winfield, and she told us as a matter of fact he was standing right outside my office in the corridor waiting for her.

I dispatched an officer to ask him to come in. Right then and there, not knowing the full import of the case, not knowing how deeply he was involved, the Government made an offer to solicit his cooperation in the case, because at that time we thought that Charles "Boo" Thornton, whom we did know, was a much more major figure in narcotics trafficking in this city than was Mr. Roberts. As events later transpired we were shown to be wrong, but we didn't know that at the time.

We solicited Mr. Roberts' cooperation to testify in the Grand Jury and at trial against Mr. Thornton. We promised him that the nature and extent of his cooperation would be made known. Suffice it to say what we offered him was a plea bargain on a silver platter, from which he would have emerged perhaps with some jail

time, but with certainly a plea offer to a much less serious offense than what has ultimately transpired in the case.

Thereafter he began to cooperate, as Mr. Palmer noted. He told us what the terms "street" and "half street" meant. He told us how he delivered drugs in his girlfriend's Jaguar to Mr. Thornton. He told us a number of things which incriminated him. But when we asked him to go a step further and identify the person or persons from whom he was getting the drugs, and the location, and to lay out the conspiracy and identify other co-conspirators who were involved with them, he balked.

At that point, despite repeated entreaties to secure his cooperation to go that extra step, he adamantly refused. And of course what resulted was an indictment charging him with conspiracy, and only five telephone counts, though there were a maximum of 13 calls we could have indicted him for.

Throughout the long process that has occurred from June of 1975 when he first came into my office, up to today, he still has refused to cooperate.

So as we stand here today, as a prosecutor I am not in a position as I would be in many cases, in dealing with defendants like Mr. Roberts, and cases like this involving drugs, to come to the Court and say, Your Honor, we would ask you to take into account some extenuating and mitigating circumstances, that the defendant has cooperated by providing us with certain information. He has stonewalled it.

So we find it somewhat ironic for counsel to plead on Mr. Roberts' behalf, and to ask for probation, when a defendant over a course of many, many years, knowing what he faces, and knowing that we desired the information, still refuses to disclose it.

Mr. Roberts is 33 years old. He did this, from what we're able to discern, that is deliver drugs on call in a Jaguar automobile, worth many thousands of dollars and titled in his girlfriend's name, for only one interest, avarice, greed, money.

When this case arose way back in 1975 and the end of 1974, he was unmarried, had no children to support, no house payments to make, he lived with his girlfriend. The lease was in her name, the car was in her name. He had been unemployed for many years prior to 1975. He had been unemployed for many years since he had gotten out of Lorton. And yet, Your Honor, the life style that he was leading, the place where he was living, the car he was driving, the clothes he was wearing, the fact that he was going to Federal City College as a student, these things, Your Honor, instead of being taken into account as extenuating and mitigating circumstances, we think are appropriately to be considered as circumstances enhancing the seriousness of the offense and seriousness of the offender. It is not a defendant coming before the Court like Valjean in the Victor Hugo novel Les Miserables, where he stole bread because he had to eat. He did that for that reason. When Mr. Roberts had an opportunity to get a deal on very good circumstances, he threw it up in our face.

More than that, Your Honor, he is not a novice offender, he is not a neophyte. In 1968 in this courthouse he was charged in a 15 count indictment with multiple counts of bank robbery, and he went to trial and was convicted of all the counts which were preferred against him: UUV, one count; federal bank robbery, five counts; local bank robbery, five counts. And he was sentenced to one to five years on the UUV, and five to 15 on the bank robbery charges. And as the Court has heard, he served five and a half years at Lorton, and then he gets out.

Does he lead a law abiding life then? Is there anything today to make the Court or anyone else come to a reasonable conclusion that this man, with this background, is more likely to be law abiding from today forward than he was when he got out of Lorton five and a half years ago?

Your Honor, when you take into account the seriousness of this offense, and we do regard it as a serious offense, where he delivered heroin on call, where he himself was not an addict, where he had been unemployed, where he was a young, strong, employable, healthy human being, where he refused to assist the Government and thereby brought down on his head charges much more severe than would have been brought down, it's the Government's feeling that the appropriate sentence in this case is as we suggested.

Assuming the Court were to impose what we're asking, it is far less severe than what the Court imposed two years ago, and there have been, to counsel's way of thinking, no changed circumstances to support Mr. Palmer's recommendation for probation. We think that our recommendation, taking into account the offense, the Government efforts to have him cooperate, the lack of extenuating and mitigating circumstances, is an appropriate one, and therefore we would ask the Court to impose it.

THE COURT: Do you want to make a response, Mr. Palmer?

MR. PALMER: Yes, sir. The Government, it seems to me, is pretty well agreed that Mr. Roberts was essentially an errand boy in the matter, and they are really mad at him because—

THE COURT: I don't think they say that at all.

MR. PALMER: Well, insofar as the evidence is concerned, they have him delivering to Mr. Thornton drugs on three occasions, $100, $50, whatever, street, half street, that's the evidence. And the Government is indicating that they are mad at Mr. Roberts, they are seeking to get all this time because he didn't cooperate with them, and apparently that's what they wanted. He didn't do it, therefore he deserves to get the brunt of the time in this case, even though the target in the investigation, Mr. Thornton, got probation. And they are saying essentially, it seems, well, we've got this fellow, so let's get what we can from him. I think that's the thrust of the Government's argument.

Now, on the other point, the Government came and talked about the first sentence that Your Honor imposed. That was one of the very reasons we had filed these recusal motions, because it is difficult, as the Second Circuit said, for a judge once to have sentenced somebody, which we did cite the Maynard case which Your Honor did change that, but the Second Circuit Chief Judge Kaufman said once the judge has sentenced somebody it is tough to get it out of their mind and change the structure. Here we have a different type of plea.

The Government is arguing to Your Honor that very thing that we sought to avoid. They are saying Your Honor did this before, you gave him this amount of time, and now looking in this context it will be different, but have that firmly in your mind. So they are impressing Your Honor with the very point we sought to avoid. And I am sure, Your Honor, or I hope Your Honor will avoid that very argument, which is the basis of the recusal motion, not to be trapped into something Your Honor did before and bound by it, because the circumstances have changed now. Mr. Roberts is in a changed position, and I'll tell you why. Mr. McSorley says things haven't changed. I think they have changed dramatically,

in the sense that as I indicated we are not here on behalf of a suppliant saying, Your Honor, give this man another break, maybe he has committed another offense and has done wrong, but put him on probation. This man has actually served almost two years in a federal penitentiary. Atlanta is a maximum security prison. And I think in these circumstances he is really, to me, very frightened, and hasn't been going out at night, is seeking to straighten up his life. I think to send him back now would do more harm than good.

If he does mess up Mr. Connor and us will be back here, and Your Honor can impose what you want to, and I think under the circumstances, under all the facts in this case, looking at the broad view, we don't think we're being unreasonable.

Thank you.

THE COURT: Mr. Roberts, we have considered your case very carefully. We have noted again you were on parole from a bank robbery conviction, which you have had prior involvement with the law. In this case you were clearly a dealer, but you had an opportunity and failed to cooperate with the Government. Accordingly, it is the judgment of the Court that on each of these two counts you be sentenced to a term of one to four years, that those counts be consecutive, and in addition that there shall be a three-year term of special parole. We are not imposing a fine.

Thank you.

SEPARATE STATEMENT BY *Circuit Judge* MACKINNON:

1. The premise of the foregoing statement is that "a defendant's failure to cooperate with law enforcement officials [was considered by the court] as an aggravating circumstance warranting imposition of an enhanced sentence." The transcript, however, does not support the assertion that Roberts obtained an "enhanced sentence for his failure to cooperate with law enforcement officials." The record in this respect states:

> THE COURT: Mr. Roberts, we have considered your case very carefully. We have noted again you were on parole from a bank robbery conviction, which you have had prior involvement with the law. In this case you were clearly a dealer, but you had an opportunity and failed to cooperate with the Government. Accordingly, it is the judgment of the Court that on each of these two counts you be sentenced to a term of one to four years, that those counts be consecutive, and in addition that there shall be a three-year term of special parole. We are not imposing a fine.

My complete familiarity with the facts of this entire case results from having written the opinion reversing the first conviction. The entire record reflects that Roberts is a very substantial drug distributor. His sentence of 2 to 8 years is a very light sentence for a drug *distributor* with a prior conviction for bank robbery. Thus, neither the length of the sentence nor the court's statement at sentencing indicated that Roberts obtained an "enhanced sentence". He obtained a sentence that is minimal for his type of continuing egregious conduct which involved a prior conviction for bank robbery. It is hard to imagine what lesser sentence than 2 to 8 years a court could adjudge for a convicted bank robber who subsequently is convicted of being a drug *distributor*.

2. In *Brady* v. *United States*, 397 U.S. 742 (1970) the Court observed that—

> "one of the circumstances [surrounding a decision to plead guilty where only a jury could impose the death sentence] was the possibility of a heavier sentence following a guilty verdict after a trial."

397 U.S. at 749. It is significant that the Court made no adverse comment with respect to this situation where a more severe sentence was authorized if the defendant did not cooperate to the extent of pleading guilty.

As to compensating a defendant who cooperates with the Government the Court also remarked as to those who plead guilty:

> "[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary."

397 U.S. at 753. Cooperating with the Government in law enforcement is an even greater benefit than merely pleading guilty. Congress has recognized this by authorizing the Government to grant up to complete immunity for testimony from those who refused to cooperate with the government. 18 U.S.C. § 6001 *et seq.* And Judge Heaney wrote for the Eighth Circuit, "[a]n agreement not to prosecute an accomplice who is cooperating in the conviction of others is recognized as a proper exercise of authority. A.B.A. Standards for Criminal Justice, The Prosecution Function § 3.9(b) (vii) (Approved Draft, 1971)." *United States* v. *Librach*, 536 F.2d 1228, 1230 (8th Cir.), *cert. denied*, 429 U.S. 939 (1976). Whether these situations are viewed as facing a more severe sentence for not cooperating or a more lenient sentence for

cooperating, the situation is merely two sides of the same coin.

3. If judges were no longer permitted to consider a defendant's cooperation with law enforcement officials, then prosecutors would take that factor into account by pressing the more severe charges for those who refuse to cooperate and reducing the charges of defendants who do cooperate. R. Dawson, *Sentencing: The Decision As To Type, Length, and Conditions of Sentence* 177 (1969).

4. It is also surprising that the trial court's action in sentencing a major drug distributor, which merely referred to his prior conviction for bank robbery and his failure to cooperate with the government, is here questioned. *Cf.*, *United States* v. *McCord*, 509 F.2d 334, 346-48 (1974), where the judge during sentencing stated very precisely that "full cooperation with the prosecutor might result in lighter sentencing." *Id.*, at 347. And he was referring to cooperation in prosecuting others.

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1793

WINFIELD L. ROBERTS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition For Certiorari Filed May 30, 1979.
Certiorari Granted October 1, 1979.

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1793

WINFIELD L. ROBERTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

United States District Court For The District Of Columbia

United States of America

v. Crim. No. 75-619

1. Charles J. Thornton a/k/a Boo

2. Winfield L. Roberts a/k/a Win

RELEVANT DOCKET ENTRIES

Mar. 20, 1978 #2: Plea not guilty withdrawn; Plea Guilty To Counts 2 and 5 (unlawful Use of Communication Facility, 21 U.S.C. 843(b)); referred; bond.
Govt. reserved right to allocute.
Rep: D. Bossard Pratt, J.

Mar. 28, 1978 #2: Motion For the Court to Recuse itself from sentencing deft. or in the alternative to make the sentences on counts 2 and 5 concurrent with each other.

April 6, 1978 #2: Opposition of Govt. To Motion for the court to recuse itself from sentencing the deft. or in the alternative to make the sentences on counts 2 and 5 concurrent with each other.

April 19, 1978 #2: Memorandum of Govt. on Sentencing. c/s

April 21, 1978 #2: Sentence: Count 2, one year to four years, Count 5, one year to four years, said sentence to run consecutively, plus 3 years Special parole, Sentence to be served in a Federal Institution, Remaining counts dismissed.
Deft committed Commitment issued.
Rep. D. Bossard Pratt, J.

[TITLE OMITTED IN PRINTING]

MOTION FOR THE COURT TO RECUSE ITSELF FROM SENTENCING THE DEFENDANT OR, IN THE ALTERNATIVE, TO MAKE THE SENTENCES ON COUNTS 2 AND 5 CONCURRENT WITH EACH OTHER

I.

For the reasons stated in both our motion to have the court recuse itself and the petition for a writ of mandamus or prohibition, we respectfully move the Court to recuse itself from sentencing the defendant upon his guilty pleas herein.

II.

Count 1 of the indictment charges the defendant and Charles "Boo" Thornton with a conspiracy to violate the federal narcotic laws pertaining to heroin. (21 U.S.C. §846). Overt acts 1-4, in support thereof, allege use of a communication facility, *i.e.*, a telephone, to further the objects of that conspiracy. It was conceded at the time the plea was taken on March 20, 1978, to substantive counts 2 and 5, that those counts are precisely the same as overt acts 1 and 4 respectively. Since the gist of a conspiracy is a criminal agreement or partnership, it is our contention that, as a matter of law, consecutive sentences cannot be meted out for violations of counts 2 and 5 which reflect acts in furtherance of the conspiracy and which were an integral part of but a single criminal enterprise or scheme. If we are incorrect in this, then the Govern-

ment could have charged the defendant with each of the 50 or more alleged phone calls, *i.e.*, 50 substantive phone counts, and the defendant would have faced a maximum liability of 15 years on the primary conspiracy charge and over 200 years on the charges which but breathed life into that conspiracy—an intolerable result we submit. In commenting on the rule of lenity, Judge Leventhal observed the following for the Court *en banc*:

> "Obviously there is a need to be careful to prevent injustice when what is essentially a single course of conduct may be prosecuted as more than one offense, under more than one statutory provision. Such injustice is obviated by the rule prohibiting the imposition of consecutive sentences, in appropriate cases, even when the defendant has committed two or more legally distinct offenses." *Fuller v. United States*, 132 U.S. App. D.C. 264, 289, 407 F.2d 1199, 1224 (1968).

Although this approach clearly mandates concurrent sentences in the case at bar, our research has revealed no case in this circuit or any other circuit which has specifically addressed this question.

We would further note that, in our experience, were this case in court for the first time with no prior sentencing history, we would expect the sentencing Judge to impose concurrent sentences *upon the guilty pleas*—indeed, we regard this as common practice in this courthouse. Therefore, we urge that the Court's prior sentence upon the defendant's prior plea not affect what would be the normal sentencing procedure at present.

Furthermore, we know of no case in this jurisdiction where consecutive sentences were imposed for violations

of 21 U.S.C. §843(b) (counts 2 and 5) and we have found no appellate opinion from any circuit wherein telephone counts resulted in anything but concurrent sentences as a matter of fact. See, *e.g.*, *United States v. Losing*, 560 F.2d 906 (8th Cir. 1977).

Accordingly, we respectfully urge that the sentences herein or counts 2 and 5 be concurrent.[1]

Respectfully submitted,

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
785-1250

[CERTIFICATE OF SERVICE OMITTED]

[TITLE OMITTED IN PRINTING]

GOVERNMENT'S OPPOSITION TO MOTION FOR THE COURT TO RECUSE ITSELF FROM SENTENCING THE DEFENDANT, OR, IN THE ALTERNATIVE TO MAKE THE SENTENCES ON COUNTS TWO AND FIVE CONCURRENT WITH EACH OTHER

The United States of America, by its attorney, the United States Attorney for the District of Columbia, respectfully opposes the defendant's motion on the following grounds:

---

[1] If concurrent sentences are imposed, we specifically abandon argument I, *supra*, after consultation with and consent of the defendant.

I.

Both sides have previously filed written memoranda addressed to the recusal issue. We adopt our previous arguments and urge the Court to reaffirm its earlier decision not to recuse itself.

II.

The defendant argues that consecutive sentences cannot be imposed on his factual plea of guilty to counts two and five of the indictment because they "were an integral part of but a single criminal enterprise or scheme" (Defendant's motion at 1). We submit that his contention is erroneous and flies in the face of settled law.

Counts Two and Five both allege violations of 21 U.S.C. 843(b) (unlawful use of a telephone to violate the Controlled Substances Act). Count Two alleges that the phone was used on March 10, 1975, while Count Five alleges its use on March 16. The conspiracy count of the indictment (Count One), which will be dismissed at sentencing, alleged an unlawful agreement to violate 21 U.S.C. 841(a), the unlawful distribution and possession with intent to distribute heroin.

It is clear that each of the thirteen (13) completed calls between Roberts and Charles "Boo" Thornton could have been charged as separate and distinct offenses. *Katz v. United States*, 369 F.2d 130, 135 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 347. Consequently, consecutive sentences would have been permissible.

The leading case on consecutive sentences, which the

defendant overlooks, is *Blockburger v. United States*, 284 U.S. 299 (1932). There the defendant was convicted of three offenses arising from his sale of morphine to the same purchaser on two separate days. The Court found that even though the purchaser was the same on each of the two days, and the two sales occurred only hours apart, that each sale constituted a separate offense under the Harrison Narcotic Act. The Court affirmed the imposition of *consecutive five year sentences on each count even though the second and third counts related to the same sale* (the second involved morphine not in the original stamped package while the third charged that the sale was not made in pursuance of a written order). Notwithstanding that the two sales were suggestive of a continuing scheme or plan, the Court found that each sale was a separate and distinct offense permitting the imposition of consecutive sentences. If the sales of narcotics on separate days are subject to consecutive punishment, logic requires the same conclusion for the use of a telephone on separate days. We submit that the reasoning and holding of *Blockburger* controls the instant case.

It is also indisputable that had Roberts gone to trial and been convicted of the conspiracy charge and the four substantive telephone offenses that he could have received *consecutive* sentences. The law is well settled that a court may impose consecutive sentences for conspiracy to commit a crime and its later accomplishment because conspiracy requires proof of agreement to commit a crime, but no proof of attempt, and the substantive violation requires the latter, but not the former. *See, e.g., Curtis v. United States*, 546 F.2d 1188, 1190 (5th Cir. 1977) (sustaining separate sentences for conspiracy to violate narcotics laws and substantive violations); *Nolan v. United States*, 423

F.2d 1031 (10th Cir. 1969), *cert. denied*, 400 U.S. 848 ( ) (consecutive sentences for illegal use of telephone (18 U.S.C. 1952) and conspiracy to violate 1952 proper); *Tolliver v. United States*, 224 F.2d 742 (9th Cir. 1955) (an accused can properly be convicted of both conspiracy to violate narcotics laws and substantive narcotics violations even though the overt act of the conspiracy might also have been an offense which was one of the substantive counts; the offenses are not identical).[1]

WHEREFORE, we respectfully submit that the defendant's motion should be denied.

Respectfully submitted,

EARL J. SILBERT
United States Attorney

DONALD E. CAMPBELL
Assistant United States Attorney
Chief, Major Crimes Division

JOSEPH F. McSORLEY
Assistant United States Attorney
Major Crimes Division
426-7389

[1]We are aware, of course, that where several statutory violations constitute only a single offense, only one punishment is proper. This is known as the "merger of offenses doctrine" and its use is most vividly seen in bank robbery cases where an accused is convicted of both bank robbery and entry of a bank with an intent to commit a felony. In *Prince v. United States*, 352 U.S. 322 (1957), the Supreme Court held that the latter crime merged into the former, and only one punishment was appropriate. In the instant case, however, as we have already shown, Roberts used the telephone on two separate days and thus committed two separately punishable offenses, analogous to the *Blockburger* case of two separate narcotic sales.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Government Opposition has been mailed to attorney for defendant, Allan M. Palmer, 1707 N Street, Northwest, Washington, D.C. 20036 this 6th day of April, 1978.

JOSEPH F. McSORELY
Assistant United States Attorney
Major Crimes Division
426 7389

[CAPTION OMITTED IN PRINTING]

GOVERNMENT MEMORANDUM ON SENTENCING

The United States of America has filed this sentencing memorandum in support of our request that the Court impose a substantial sentence of imprisonment, and a substantial fine, on Winfield L. Roberts, the defendant herein, a supplier of narcotic drugs.

For the convenience of the Court and counsel, we have attached a Table of Contents.

TABLE OF CONTENTS

[CAPTION OMITTED IN PRINTING]

GOVERNMENT MEMORANDUM ON SENTENCING

The United States of America, by its attorney, the United States Attorney for the District of Columbia, pursuant to 18 U.S. Code, 3577, 23 D.C. Code 103 and *Quarles v. United States*, D.C. Ct. App. No. 8759, decided December 31, 1975, and other authorities cited herein, hereby informs the Court that the Government will exercise its right of allocution at the sentencing of the defendant, Winfield L. Roberts. We will recommend that the defendant be sentenced to a substantial term of imprisonment and a substantial fine pursuant to his plea of guilty to 21 U.S. Code 846 which provides for up to fifteen (15) years imprisonment and a $25,000 fine.

The basis for our recommendation is the following information concerning the defendant's criminal record

and other background material which has been assembled by the Major Crimes Division of the United States Attorneys Office and the Narcotics Squad of the Metropolitan Police Department. We respectfully submit that this material, considered together with the facts of the crime for which the defendant is to be sentenced, warrants the imposition of a substantial sentence.

A. Function of the Major Crimes Division

Preliminarily, we think it is germane to state the purpose of the Major Crimes Division (MCD). The MCD's primary function involves the investigation and prosecution of *major organized crime figures and/or major criminal operations* in the District of Columbia. Its cases are brought in both the Superior Court and the District Court. The Division's caseload is selective rather than voluminous. Its focus is on major criminal figures and the immobilization of significant criminal operations, particularly in the areas of narcotics, gambling and fencing.[1] This, of course, necessitates the coordinated, concentrated, intense efforts not only of presecutors but of many investigative agencies, both federal and local.

With respect to narcotics operations, it has been the practice of MCD initially to identify a lucrative narcotics trafficking enterprise and its hierarchical struc-

[1] MCD is the section of the United States Attorneys Office which handled the legal investigation in "Operation Sting" which thus far has resulted in the arrests of over 100 defendants and the receiving of more than $2.4 million in stolen property.

ture, learn the identities and activities of its principals, and then to proceed to target certain of those individuals for surveillance and investigation. The investigative means often include electronic as well as physical surveillance. Extensive use is made of special grand juries which are empaneled for eighteen months. In addition, undercover probes are utilized as frequently as possible since such enterprises are generally more easily penetrable from the "inside" than from the "outside." In the instant matter wiretaps and an undercover officer were both employed with great success.

Because major criminal figures are usually very suspicious, canny and circumspect, the more important the offender's role in the enterprise, the less susceptible he is to arrest and prosecution. Such figures tend to erect, maintain and control criminal structures which provide them great insulation from detection and arrest. In cases such as this, where the essence of the offense is a conspiracy, court-authorized wiretaps are invaluable investigative aids.

B. Purpose of this Allocution

We propose by this written allocution to inform the Court fully of the background of Winfield L. Roberts in the field of narcotics trafficking so that in discharging its sentencing function the Court will possess the fullest information possible on which to make an informed judgment. We believe that the contents of this allocution, combined with the overwhelming evidence of guilt as shown by the taped conversations of Roberts and his co-conspirator, Charles "Boo" Thornton (who is sched-

uled to be tried on April 20 before the Honorable Howard F. Corcoran) and Roberts' confession, amply warrant the imposition of a substantial term of imprisonment and a substantial fine.

C. Information Which May Properly be Considered by a Sentencing Judge

It is axiomatic that a sentencing judge may consider a wide variety of information as to a defendant's background, character, and conduct, criminal and otherwise, in imposing a sentence. The Supreme Court has consistently held that even acts and conduct *not* resulting in convictions may properly be considered. *See Williams v. New York*, 337 U.S. 241, 246-247 (1948) (it was proper for the trial judge to have considered evidence of 30 other burglaries believed to have been committed by the defendant); *Williams v. Oklahoma*, 358 U.S. 576 (1959) (the sentencing judge may consider hearsay information which is relevant to the crime and the defendant's life); *United States v. Majors*, 490 F.2d 1321 (9th Cir. 1974) (a trial judge can properly consider prior arrests and indictments not resulting in convictions); *United States v. Sweig*, 454 F.2d 181 (2nd Cir. 1972) (the sentence was affirmed where it was based on information not contained in the pre-sentence report which included evidence of offenses for which the defendant was *acquitted*).

Moreover, 18 U.S. Code 3577 provides:

> No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

As stated by the Court in *Williams v. New York, supra*, 337 U.S. at 247:

> A sentencing judge . . . is not confined to the narrow issue of guilt. His task . . . is to determine the type and extent of punishment after the issue of guilt has been determined Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.

D. Background of the Case

In December 1974 the Postal Inspectors Office notified the Metropolitan Police Department of suspected large-scale narcotics trafficking by postal employees and others. The Narcotics Squad thereafter inserted an undercover policewoman in the Main Post Office to attempt to unearth whatever illegal narcotic activity existed. Before very long a number of suspects had been identified. Working her way upward by ingratiating herself with certain of the suspects by buying large amounts of heroin (the purchases ranged from $65.00 to $1,400.00), the undercover officer (U/C) eventually came to meet Fletcher Bush, also known as Dutchie, and Elaine Dorsey. She was rebuffed, however, in her efforts to locate their supplier. Amassing all the information they had gathered, application was made to the Honorable George L. Hart, Jr., for a wire intercept on the telephone numbered 678-1091, listed at 3044 Stanton Road, which was

believed to be the telephone of Benjamin T. Thornton, a previously convicted narcotics felon.[2]

1. The Wiretap

The wiretap was operational for a period of fifteen (15) days (March 4-18, 1975). It resulted in the interception of about 585 completed calls (*viz.* where conversations occurred between the caller and the callee). Calls of both a gambling and narcotic-related nature were intercepted. The instant case was one of four indictments spawned by the wiretap. This is the first indictment to reach a finding or verdict.

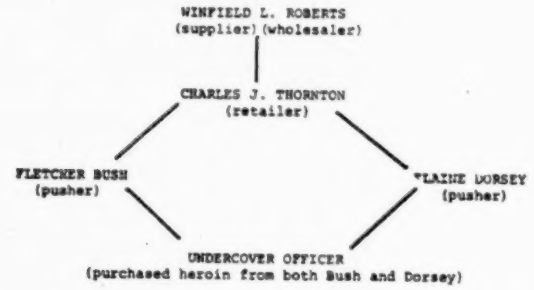
Among the calls intercepted were those between Winfield L. Roberts (who identifies himself as Win) and Charles Thornton (identified as Boo). The conversations were clearly narcotic-related. Various code words were used by the speakers to attempt to disguise the subject matter of their calls, e.g., "tighten it up" (improve the quality of the heroin, it's too weak), "I need a little something" (the speaker wants heroin), "boy" ("boy" refers to heroin, "girl" to cocaine), "meet ya on the same street" ("street" means a $100.00 bag of heroin—one spoon), and "half-street" (a $50.00 bag).

All of the intercepted conversations between Roberts and Thornton resulted from calls placed by Roberts to Thornton. These conversations establish beyond any doubt that Roberts was Thornton's supplier. We invite

[2] As the police were subsequently to learn, this was the residence of Benjamin's brother, Charles "Boo" Thornton, himself a previously convicted narcotics felon.

the Court's attention to the attached transcripts of the Win-to-Boo calls, including calls of the accomplices Dutchie and Elaine.[3]

A chart of the conspirators in this investigation and their roles would look like this:



2. The Confession

When it was finally learned just who "Win" was, he was asked to come into the United States Attorneys Office. He was advised of his rights, was told of the existence of the tap, was told that we were desirous of obtaining his cooperation in testifying against Thornton, and that the nature and extent of his cooperation would be determinative of the charges which could be brought against him.[4]

Roberts admitted that he was the one whose conversations with Thornton had been intercepted and that he had used his girlfriend's (Cecilia Payne) Jaguar to

[3] After their arrests in connection with this case, Dutchie and Elaine agreed to cooperate and testify for the Government against Boo Thornton. Each testified before the Grand Jury and each later pleaded to a narcotics felony. Both are currently on probation. During the entire conspiracy they never had any dealings with Roberts. Their role can accurately be described as Boo's "pushers."

[4] At the *Miranda* suppression hearing, Judge Corcoran found that there was a voluntary, intelligent and knowing waiver of rights.

deliver the drugs to Thornton's apartment. He also said that "street" referred to a $100.00 bag of heroin and "half-street" to a $50.00 bag.

Roberts declined to testify against Thornton and refused to name his supplier of narcotics. Accordingly, he was arrested and indicted.

Together with the surveillances which identified Roberts and the Jaguar as arriving at Thornton's apartment shortly after certain drug-related conversations, the wiretap and the confession amounted to very strong evidence of guilt.

E. Background of the Defendant

Roberts will soon be 32 years old. He is single, unemployed and attends Federal City College. As far as we know, he has no disabling injuries or sicknesses and is employable.

In 1968 Roberts and three others were convicted of eleven (11) counts of an indictment: unauthorized use of a vehicle (one count), federal bank robbery (5 counts), and local bank robbery (5 counts) (22 D.C. Code 2204, 18 U.S. Code 2113, 22 D.C. Code 2901 respectively). The conviction was the subject of a written opinion by the Court of Appeals: *Earl Coleman, et al. v. United States*, 137 U.S. App. D.C. 48, 420 F.2d 616 (1969). Roberts was sentenced to one (1) to five (5) years on the unauthorized use of a vehicle charge and five (5) to fifteen (15) years on the bank robbery charges, the sentences to run concurrently. He is currently on parole until February 1983.

One of the most interesting facts to consider about Roberts is his source of income. It is somewhat ironic

that a man who has been unemployed since he was released from prison several years ago manages to squire heroin about in a 1973 Jaguar automobile.[5] Rarely have narcotic drugs been transported in such style. Roberts, who is without any visible means of support, nonetheless manages to dress in very expensive attire. Moreover, he manages to have sufficient funds to have retained Mr. Sacks as his attorney. Roberts is living proof that sometimes it pays to be poor.

It is clear from the investigation that the source of Roberts' income is trafficking in heroin. He has profited from supplying heroin to Charles Thornton.[6] While industries may pollute the atmosphere and our water by the dumping of chemical wastes, Roberts' activities resulted in the pollution of people of this city. And his motive was clear: money. He himself is not an addict, yet addicts are his prey and people like him feed their insatiable habits.

What is even more reprehensible to consider is that he has no real need for money—no wife or children to support, no house repairs, no exorbitant medical bills, etc. . . . He pays little tuition at Federal City College.

[5]The automobile is listed in the name of Roberts' girlfriend, Cecilia Payne of 4300 Vermillion Avenue, Oxon Hill, Maryland. Miss Payne is a Government employee who earns about $12,000 a year by her own admission, who owns the Jaguar which cost her $6,650 to purchase in late 1974 and who lives in a rent-subsidized apartment.

[6]We have no evidence of whether he supplied anyone other than Thornton. The wiretap conversations of Roberts revealed him to be a man of few words who was not given to talk freely about his clientele.

He drives his girlfriend's Jaguar. He appears to live with her at her apartment. In short, it is people like Roberts' who are so avaricious that they don't know when to leave well-enough alone.

Previously convicted felons who work their way through college by supplying heroin on-call have abused the concept of parole and are deserving of stern treatment.[7]

F. The Government's Recommendation

The United States Attorney's Office does not often file a written allocution. When we do, we do not do it lightly or unthinkingly because sentencing is obviously one of the most important parts of the criminal process—important to both the community and the offender. Having invested thousands of man-hours and thousands of dollars in this entire investigation, we believe we have obtained reliable and accurate information about this narcotics conspiracy and its co-conspirators, including Roberts—the main supplier—which can be extremely useful to the Court in determining the appropriate sentence. We strongly believe that this is an appropriate case and an appropriate offender where a written allocution can bring to

[7]We believe that one who pleads guilty prior to trial is entitled to some favorable consideration because of savings of judicial economy. This does not mean, of course, that one who goes to trial should be penalized if convicted merely for exercising a constitutional perogative and we have never known any court to hold such a view.

the Court facts it may not otherwise obtain.[8]

As we noted at the outset, we recommend a substantial sentence of incarceration and a fine. In attempting to balance the needs of society against the needs of Roberts, we have considered the common aims of punishment: rehabilitation, deterrence, and the protection of society. Roberts already has had the experience of rehabilitation within the confines of a prison. In fact, one of his comments during his confession was that he met Thornton while they were together at Lorton. The most his stay at Lorton seems to have accomplished was to divert Roberts from violent crime (bank robbery) to the surreptitious, shadowy type crime of conspiring to distribute narcotics.

As for deterrence, we firmly believe that while jail is not a panacea for all the ills of society, that where a major drug dealer is convicted a substantial term of incarceration and fine does have an impact that reverberates throughout the city and makes people think twice before engaging in a narcotics enterprise. As with many other things in life, deterrence is difficult to accurately gauge or measure. But we know from experience that many criminals often boast of beating the system by getting free lawyers, free appeals, lenient sentences and short prison stays. Stern and stiff punishment of a dealer—as opposed to a "user":—is a very useful way of putting people on notice that such crimes will not pay.

[8] Even the diligent and conscientious members of the Probation Office could not be expected to be in possession of much of the material disclosed in this allocution since their contact with the offense and Roberts is much briefer than that of the officers who were the primary investigators.

Lastly, this is the type of offender who is just as much, if not more, of a danger to the community than an armed robber. His methods are more insidious and cunning. We think it fair to state that narcotics, particularly heroin, wreak havoc on the lives of those it touches. Its cost in human life and misery is incalculable. Society needs to be protected from men such as Roberts who show so little regard for the health and welfare of its citizens.

Respectfully submitted,

EARL J. SILBERT
United States Attorney

DONALD E. CAMPBELL
Assistant U.S. Attorney
Chief, Major Crimes Division

JOSEPH F. McSORLEY
Assistant U.S. Attorney
Major Crimes Division
Telephone 426-7389

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Government motion has been mailed/hand-delivered to Fred Sacks, Esquire, 1030 15th Street, Northwest, Washington, D.C., this 25th day of March, 1976.

JOSEPH F. McSORLEY
Assistant U.S. Attorney
Major Crimes Division
Telephone 426-7389

[CAPTION OMITTED IN PRINTING]

GOVERNMENT'S MEMORANDUM ON SENTENCING

The United States of America, by its attorney, the United States Attorney for the District of Columbia, respectfully submits the following memorandum as an aid to the Court in passing sentence.

I. BACKGROUND

Winfield Roberts first pleaded guilty (Alford) in this case to conspiracy to violate the Controlled Substances Act in March 1976. This Court sentenced him to four (4) to fifteen (15) years, a special parole term of three (3) years, a $5,000 fine, and recommended incarceration at Atlanta Federal Penitentiary

In December 1977 the D.C. Circuit Court of Appeals reversed Roberts' conviction for reasons set forth in a lengthy opinion and remanded the case. On January 26, 1978, this Court released Mr. Roberts on a $5,000 bond to enable him to prepare his defense.

On March 20, 1979, Mr. Roberts entered a factual plea of guilty to Counts Two and Five of the indictment, both of which allege unlawful use of the telephone to facilitate the distribution of heroin. The Government retained the unconditional right to allocute and Mr. Roberts was released on bond pending sentencing.

II. SENTENCING RECOMMENDATION

It is the Government's recommendation, for reasons previously discussed in our written sentencing allocution filed prior to the first sentence–his prior criminal record, his culpability as the supplier for Charles "Boo" Thornton, etc.–that maximum consecutive sentences be imposed.

For the reasons previously noted in our opposition motion opposing recusal and making the sentences concurrent (filed April 6, 1978), we maintain that the Court can properly impose *consecutive* sentences. Accordingly, we respectfully request the Court to impose the following sentence:

A. *Imprisonment and Fine*

1. On Count Two 16 to 48 months and a fine of $5,000.
2. On Count Five, 16 to 48 months, consecutive to Count Two.

Mr. Roberts should be given credit for time served.

B. *Special Parole Term*

Three years on each count.

Respectfully submitted,

EARL J. SILBERT
United States Attorney

DONALD E. CAMPBELL
Assistant United States Attorney
Chief, Major Crimes Division

JOSEPH F. McSORLEY
Assistant United States Attorney
Major Crimes Division
(202) 426-7389

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Government's Memorandum on Sentencing has been hand delivered to attorney for defendant, Allan M. Palmer, 1707 N Street, Northwest, Washington, D.C. 20036, this 19th day of April, 1978.

JOSEPH F. McSORLEY
Assistant United States Attorney
Major Crimes Division
426-7389

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v. Criminal No. 75-619

WINFIELD L. ROBERTS,
Defendant. *SENTENCING*

TRANSCRIPT OF PROCEEDINGS

Washington, D.C.
April 21, 1978

The above-entitled matter came on for hearing in open court at 9:35 o'clock a.m , before:

THE HONORABLE JOHN H. PRATT,
United States District Judge.

APPEARANCES:

On behalf of the Government:

JOSEPH F. McSORLEY, ESQUIRE,
Assistant United States Attorney.

On behalf of the defendant:

ALLAN M. PALMER, ESQUIRE

[2] **PROCEEDINGS**

DEPUTY CLERK: United States of America versus Winfield L. Roberts, Criminal Number 75-619. Mr. McSorley for the Government, Mr. Palmer for the defendant.

THE COURT: Mr. Palmer, do you or Mr. Roberts have anything you wish to say before sentence is imposed?

MR. PALMER: Yes, I would, Your Honor. I guess Your Honor knows normally I don't usually say too much at sentencing procedures, which is my practice. In this case I have some comments to make, however.

Now, initially we filed a motion as to whether consecutive or concurrent sentences in the matter should be imposed, and Mr. McSorley filed a pleading in the matter, also. I would like to first address myself to that question to begin with, if the Court deems it necessary.

THE COURT: You filed a motion for us to recuse from sentencing, or in the alternative to make the sentences concurrent, and you indicated that you would not press your motion to recuse if we made these sentences concurrent.

MR. PALMER: That's correct, Your Honor.

THE COURT: Well, we are not committing ourselves. It seems to me the matter of our recusal was taken care of on your petition for writ of mandamus, but I will hear from you on the matter of consecutive versus concurrent sentences.

MR. PALMER: Yes, Your Honor. The case we cited was [3] Fuller versus United States, which speaks about the need to prevent injustice when essentially it

is a single course of conduct which may be prosecuted as more than one offense, under more than one statutory provision. Such injustice is obviated by the Court imposing consecutive sentences.

Now, in this case, at the time we took the plea we made it clear that the two counts, two and five, were part–

THE COURT: They were overt acts in the conspiracy.

MR. PALMER: Yes sir. And our point is that the conspiracy is the major crime. Conspiracy is basically a conversation between two or more, whatever, and–

THE COURT: Whether or not the substantive offenses were ever committed.

MR. PALMER: That's true. And what we're saying is that these conversations breed life into the conspiracy, and without the phone count you don't really have it. And under the rationale of the Fuller case we think it would be appropriate to follow that rule.

Let's say you have 30 phone calls pursuant to a conspiracy. We're saying that you can't impose 120 years, as a matter of law, for phone calls, but 15 years for the main crime. I think it doesn't flow, and that's why the rule as announced in Fuller would apply to this case.

Secondly, the Government cited Blockberger, which was consecutive sentences under '70 statutes, that was the [4] Jones-Miller and Harrison Act of some time ago, and at the time when Justice Frankfurter said turn the screws tighter on narcotic agents. Since then we have the new set of statutes which are involved, particularly the one statute, the so-called phone statute.

THE COURT: Well, in Blockberger the man was charged with separate offenses under the Harrison Act.

MR. PALMER: The Harrison and the Jones-Miller; the Packaging and Stamp Act, as Your Honor recalls from years ago.

THE COURT: I remember.

MR. PALMER: And the other one–

THE COURT: Forty-seven-o-four.

MR. PALMER: Right, those two statutes.

Aside from the legal argument, Your Honor has a lot of experience in criminal cases, more than I do–I have a fair amount, also. I think it fair to say in my experience that when you have a plea on two counts such as this, Judges uniformly, in my experience at least, give concurrent sentences as a matter of course. In fact I know of no case in this courthouse, and I think Mr. McSorley and Mr. Connor can corroborate this if I am in error, or contradict it, in which a judge of this Court ever gave consecutive sentences for two phone counts. In fact the case that I had once, Ramsey v. U.S., which went to the Supreme Court, Judge Smith, there too on several phone counts, gave concurrent sentences. I have checked all [5] the advance sheets, and I don't know how many dozens of cases I've read, including the Federal Reporter. I have found no cases, as a matter of fact, in which any federal judge has ever given consecutive sentences for two or more phone counts.

I think based on that, based on the policy or usual procedure in this courthouse, we think it only fair, both under the law and the fact, that concurrent sentences be imposed, and I sincerely urge that.

All right. Now, without getting into that issue, the question of sentencing now comes up, and I really

want to get into this a bit because of the Government's now famous allocution in the matter. We know that during the course of this investigation there was this phone tap directed at Boo Thornton for a couple of weeks. As a result of that I believe six search warrants were executed for gambling and narcotics as a result of Mr. Thornton's activities, people arrested, et cetera. At that time no one knew Winfield Roberts from anybody else.

During the course of the investigation, I think on three occasions a green Jaguar was seen in the vicinity. The girl that owned it, Cecilia Payne, came in and said, "Yes, it's my car, I loan it to my boyfriend. He's sitting outside." "Who's the boyfriend?" "Winfield Roberts."

The Government attorney and the other policemen were there, and there was a bit of disbelief over their good fortune. [6] In any event Winfield Roberts comes in. Mr. Roberts made a statement to the police at the time.

Now, during the conversations alleged between this man and Thornton, the term "street" and "half street" were used relative to narcotics. All right. They asked Mr. Winfield Roberts about it, and he said, "Yes". I have a copy of his statement, which was given to me by Mr. McSorley. They asked him if he knew what was meant by the term "street" and "half street", because it was on the tap, and he said that "street" meant a $100 bag, and "half street" meant a $50 bag. He stated that when Boo was short on drugs he would make these deliveries to Boo in the amounts of 50 and $100 bags.

The target, Mr. Thornton, was indicted for gambling, I think, and narcotic violations, which he

pled to some and the Government dismissed as to others. Mr. McSorley files his well-known allocution. I don't know if Judge Corcoran might have overreacted to it or what, but in any event he placed Mr. Thornton, the target, on probation in the matter.

Then we get here to Mr. Roberts. His case comes to Court, they indicate to him "If you testify against Thornton, or help us with who gave you the drugs, whatever, we'll go light on you." He says, "I wasn't that involved in it," he refuses. He winds up with a substantial sentence, which he, Mr. Roberts, was somewhat surprised at, considering the course of events. [7] When the Government says Mr. Roberts was Boo's supplier, et cetera, I think you have to look at that in the context of $100, $50. The man obviously, in my experience, was a runner for somebody. He did these things not as a head of any organization or the main supplier. It is clear to me, Your Honor, in this thing he was, for the 100 or $50, whatever, giving to Mr. Thronton for his personal use, and his statement was corroborated by what? By the fact that at the time of the search warrant, at Mr. Thornton's residence, what do they find? No drugs, really, some bottle-top cookers, syringes, whatever, indicia, indications of narcotics usage, just as he indicated. So I think this had to be taken into context, Your Honor.

Now, the defendant has served almost two years in Atlanta. Now, it is easy to say here, two years, three years, four years, but I think it is something to consider that night and day for two years this man has been sitting in a jail in Atlanta, a federal penitentiary, and that is a very serious thing that weighs on his mind. Since he has been released in this case, Your Honor, I think it is fair to say, I don't know how many times he

has been calling me, but he doesn't go out at night, he has been looking for a job. But as Your Honor can imagine, when someone knows he had a prior sentence, when they know he is coming up for sentencing again, it is very difficult for someone to say oh, sure, you're going [8] to be sentenced in two weeks, I'll give you a job, sure.

We got an indication on Monday from Mr. Pendergraph that he could have a job. I submitted that to Your Honor's chambers. I saw Mr. Connor yesterday, Your Honor, indicating that the job is available.

I think in the context of this case, I think if Your Honor would agree that concurrent time could be served, he has already served over half of it, spent many a day in Atlanta thinking about what happened. It is not a case where the man has served no time and is saying to Your Honor, do us a favor and put the man on probation and he will straighten up. This man has faced jail for almost two years in a maximum security penitentiary, Your Honor.

THE COURT: How much did he serve in connection with the hold-up of the bank back in '67?

MR. PALMER: At that time how long was he incarcerated?

THE COURT: Yes.

MR. PALMER: Five and a half years, Your Honor.

THE COURT: He was on parole when this matter arose.

MR. PALMER: I believe so.

THE COURT: I notice one of the matters you submitted yesterday was a letter from Alzona J. Davis, Director of Lorton Prisoner College Program, in which he says that he has known Mr. Roberts for the past

three years, and has found him to be quite cooperative as a student.

[9] Is Alzona J. Davis connected with Atlanta, even though she's at Lorton?

THE DEFENDANT: No. This was prior to me going to Atlanta.

THE COURT: During the past three years you were not a student of Alzona Davis, were you?

THE DEFENDANT: Yes, I was a student up until my incarceration.

MR. PALMER: It sounds like she used inappropriate language. We all know where he was for the last two years.

THE COURT: Also the letter from Pendergraph that he had been accepted as a counselor in the Free School for the District of Columbia.

MR. PALMER: Yes, Your Honor. As I say, I can't remember the time when I asked this Court for a probationary sentence, based on the facts. I don't think I have ever done it in a lot of cases, but I think it is really warranted in this case, based on what has happened, what he has gone through. It is a case where he came out, his girlfriend put up bond money, and you know I'm not really getting compensated in this matter. He is living with her because he can't afford to live anywhere else. He has opportunity for employment. And I would even cite a case to Your Honor, in which Your Honor in not dissimilar circumstances–

THE COURT: Are you talking about Bubble Eyes Miles?

[10] MR. PALMER: No, no, Your Honor, Nine years ago Charles Maynard was convicted of a serious shooting offense.

THE COURT: Gueory was the victim.

MR. PALMER: Yes. Your Honor gave him six to 18 years. He was in jail about two and a half years. The case was reversed on a legal point, came back, Maynard pled to five counts. I happened to check the record, and Your Honor placed him on probation after a term of incarceration. Since that time Mr. Maynard has not been in any trouble. I understand he is doing well in the community, he has a legitimate business he is running.

Mr. Roberts has impressed me as someone who is really scared now. This two years in Atlanta, or less than two years, has really affected him, Your Honor. And if we're wrong, if he doesn't shape up, or do what he's supposed to do, you can put him in jail, and there would be no problem with that. Mr. Connor would be on him. Mr. Connor I have known for many years, he is an excellent probation officer, as Your Honor well knows. I think in this circumstance I am really asking Your Honor to do this for us based on these facts, and I think it is really warranted in this case, truthfully.

Thank you.

THE COURT: Mr. Roberts, is there anything you want to say?

[11] THE DEFENDANT: Only I'm glad that this is coming down to–we're getting ready to resolve this, and I would like to go on and get into my life, into the future, with the counseling that I have been accepted at, and get away from this, if you can see it possible.

THE COURT: Mr. McSorley.

MR. MC SORLEY: Your Honor, I would like to reply to some of Mr. Palmer's remarks.

The Government in this case, because we had filed previously a very lengthy allocution, felt no need

to supplement it with any extended pleadings. Consequently we filed only a two-page document with our sentencing recommendation that the Court impose consecutive sentences, on the basis of his factual pleas of guilty to two counts of using a telephone to facilitate a violation of the Controlled Substances Act.

In short, we have asked Your Honor to impose sentences of 16 to 48 months on each count, consecutively, which would mean, of course, a total of 30 to 96 months. Because the defendant has already served 21 months in prison, and would get credit for time served, the net result, if the Court were to accept our recommendation, would be that the defendant, if he goes back to a federal institution, would have to serve 11 months from today, generally speaking, before he becomes parole eligible.

This sentence that we're asking for is much less [12] severe than the one the Court imposed on him two years ago when it meted out a sentence of four years to 15 years. There the minimum time he would have had to serve was 48 months. In the instant case if the Court were to adopt our recommendation because of the time served it would be 11. So it would come out to be practically 16 months less time that he would end up serving if the sentence of two years ago were to be compared with the sentence we ask the Court to impose today.

Your Honor, Mr. Palmer has more or less found that the Government, by asking for consecutive sentences, is going against a rule of general usage, of customary practice in this courthouse. To some extent that is correct, because generally speaking in the pleas that I have handled in cases like this over the years, I haven't always been as harsh in asking for a particular

sentence as I am in this case, and I would like to explain why the Government has taken this reason, so as not to appear as a Simon Legree.

Many, many months ago when this case first began and we had no idea of the identity of who it was who was using that green Jaguar automobile to ferry narcotics about the city, we subpoenaed the owner in, and that turned out to be Cecelia Payne, Mr. Roberts' girlfriend. She came in and she confirmed in fact that she was the owner, and the only person she ever let drive that car was her boyfriend, whose name was Winfield, and she told us as a matter of fact he was standing right outside [13] my office in the corridor waiting for her.

I dispatched an officer to ask him to come in. Right then and there, not knowing the full import of the case, not knowing how deeply he was involved, the Government made an offer to solicit his cooperation in the case, because at that time we thought that Charles "Boo" Thornton, whom we did know, was a much more major figure in narcotics trafficking in this city than was Mr. Roberts. As events later transpired we were shown to be wrong, but we didn't know that at the time.

We solicited Mr. Roberts' cooperation to testify in the Grand Jury and at trial against Mr. Thornton. We promised him that the nature and extent of his cooperation would be made known. Suffice it to say what we offered him was a plea bargain on a silver platter, from which he would have emerged perhaps with some jail time, but with certainly a plea offer to a much less serious offense than what has ultimately transpired in the case.

Thereafter he began to cooperate, as Mr. Palmer noted. He told us what the terms "street" and "half street" meant. He told us how he delivered drugs in his girlfriend's Jaguar to Mr. Thornton. He told us a number of things which incriminated him. But when we asked him to go a step further and identify the person or persons from whom he was getting the drugs, and the location, and to lay out the conspiracy and identify other co-conspirators who were involved with them, [14] he balked.

At that point, despite repeated entreaties to secure his cooperation to go that extra step, he adamantly refused. And of course what resulted was an indictment charging him with conspiracy, and only five telephone counts, though there were a maximum of 13 calls we could have indicted him for.

Throughout the long process that has occurred from June of 1975 when he first came into my office, up to today, he still has refused to cooperate.

So as we stand here today, as a prosecutor I am not in a position as I would be in many cases, in dealing with defendants like Mr. Roberts, and cases like this involving drugs, to come to the Court, and say, Your Honor, we would ask you to take into account some extenuating and mitigating circumstances, that the defendant has cooperated by providing us with certain information. He has stonewalled it.

So we find it somewhat ironic for counsel to plead on Mr. Roberts' behalf, and to ask for probation, when a defendant over a course of many, many years, knowing what he faces, and knowing that we desired the information, still refuses to disclose it.

Mr. Roberts is 33 years old. He did this, from

what we're able to discern, that is deliver drugs on call in a Jaguar automobile, worth many thousands of dollars and titled in his girlfriend's name, for only one interest, avarice, greed, [15] money.

When this case arose way back in 1975 and the end of 1974, he was unmarried, had no children to support, no house payments to make, he lived with his girlfriend. The lease was in her name, the car was in her name. He had been unemployed for many years prior to 1975. He had been unemployed for many years since he had gotten out of Lorton. And yet, Your Honor, the life style that he was leading, the place where he was living, the car he was driving, the clothes he was wearing, the fact that he was going to Federal City College as a student, these things, Your Honor, instead of being taken into account as extenuating and mitigating circumstances, we think are appropriately to be considered as circumstances enhancing the seriousness of the offense and seriousness of the offender. It is not a defendant coming before the Court like Valjean in the Victor Hugo novel Les Miserables, where he stole bread because he had to eat. He did that for that reason. When Mr. Roberts had an opportunity to get a deal on very good circumstances, he threw it up in our face.

More than that, Your Honor, he is not a novice offender, he is not a neophyte. In 1968 in this courthourse he was charged in a 15 count indictment with multiple counts of bank robbery, and he went to trial and was convicted of all the counts which were preferred against him: UUV, one count; federal bank robbery, five counts; local bank robbery, [16] five counts. And he was sentenced to one to five years on the UUV,

and five to 15 on the bank robbery charges. And as the Court has heard, he served five and a half years at Lorton, and then he gets out.

Does he lead a law abiding life then? Is there anything today to make the Court or anyone else come to a reasonable conclusion that this man, with this background, is more likely to be law abiding from today forward than he was when he got out of Lorton five and a half years ago?

Your Honor, when you take into account the seriousness of this offense, and we do regard it as a serious offense, where he delivered heroin on call, where he himself was not an addict, where he had been unemployed, where he was a young, strong, employable, healthy human being, where he refused to assist the Government and thereby brought down on his head charges much more severe than would have been brought down, it's the Government's feeling that the appropriate sentence in this case is as we suggested.

Assuming the Court were to impose what we're asking, it is far less severe than what the Court imposed two years ago, and there have been, to counsel's way of thinking, no changed circumstances to support Mr. Palmer's recommendation for probation. We think that our recommendation, taking into account the offense, the Government efforts to have him cooperate, the lack of extenuating and mitigating circumstances, [17] is an appropriate one, and therefore we would ask the Court to impose it.

THE COURT: Do you want to make a response, Mr. Palmer?

MR. PALMER: Yes, sir. The Government, it seems to me, is pretty well agreed that Mr. Roberts was

essentially an errand boy in the matter, and they are really mad at him because–

THE COURT: I don't think they say that at all.

MR. PALMER: Well, insofar as the evidence is concerned, they have him delivering to Mr. Thornton drugs on three occasions, $100, $50, whatever, street, half street, that's the evidence. And the Government is indicating that they are mad at Mr. Roberts', they are seeking to get all this time because he didn't cooperate with them, and apparently that's what they wanted. He didn't do it, therefore he deserves to get the brunt of the time in this case, even though the target in the investigation, Mr. Thornton, got probation. And they are saying essentially, it seems, well, we've got this fellow, so let's get what we can from him. I think that's the thrust of the Government's argument.

Now, on the other point, the Government came and talked about the first sentence that Your Honor imposed. That was one of the very reasons we had filed these recusal motions, because it is difficult, as the Second Circuit said, for a judge [18] once to have sentenced somebody, which we did cite the Maynard case which Your Honor did change that, but the Second Circuit Chief Judge Kaufman said once the judge has sentenced somebody it is tough to get it out of their mind and change the structure. Here we have a different type of plea.

The Government is arguing to Your Honor that very thing that we sought to avoid. They are saying Your Honor did this before, you gave him this amount of time, and now looking in this context it will be different, but have that firmly in your mind. So they are impressing Your Honor with the very point we

sought to avoid. And I am sure, Your Honor, or I hope Your Honor will avoid that very argument, which is the basis of the recusal motion, not to be trapped into something Your Honor did before and bound by it, because the circumstances have changed now. Mr. Roberts is in a changed position, and I'll tell you why. Mr. McSorley says things haven't changed. I think they have changed dramatically, in the sense that as I indicated we are not here on behalf of a suppliant saying, Your Honor, give this man another break, maybe he has committed another offense and has done wrong, but put him on probation. This man has actually served almost two years in a federal penitentiary. Atlanta is a maximum security prison. And I think in these circumstances he is really, to me, very frightened, and hasn't been going out at night, is seeking to straighten up his life. I think to send him back now [19] would do more harm than good.

If he does mess up Mr. Coonor and us will be back here, and Your Honor can impose what you want to, and I think under the circumstances, under all the facts in this case, looking at the broad view, we don't think we're being unreasonable.

Thank you.

THE COURT: Mr. Roberts, we have considered your case very carefully. We have noted again you were on parole from a bank robbery conviction, which you have had prior involvement with the law. In this case you were clearly a dealer, but you had an opportunity and failed to cooperate with the Government. Accordingly, it is the judgment of the Court that on each of these two counts you be sentenced to a term of one to four years, that those counts be consecutive, and in

addition that there shall be a three-year term of special parole. We are not imposing a fine.

Thank you.

MR. PLAMER: Can I ask you this, Your Honor?

THE COURT: What's that?

MR. PALMER: So the term is two to eight that you have imposed, I believe.

THE COURT: What's that?

MR. PALMER: One to four and one to four, consecutive, you said.

[20] THE COURT: That's right. But a single one to three special parole term, and no fine.

MR. PALMER: Now, Your Honor, if we're correct in our proposition that a concurrent sentence is proper as a matter of law, he would be eligible for parole now.

THE COURT: Yes. And under my sentence he will be eligible for parole next December.

MR. PALMER: Well, would Your Honor consider, while the issue is being decided, setting an appeal bond, because if we're right–

THE COURT: No. If you're right it merely means he would be eligible for parole. He may also have proceedings regarding a parole violation, and nothing has been pursued on it, for what reason I don't know. So Mr. Roberts is eligible for parole in this particular case, under a different sentence, but it doesn't conclude the matter as to what the Parole Board will do in connection with his violation, which they have not noticed for hearing yet.

MR. PALMER: What I'm saying, I'm just looking at this case. though. If we are correct, then he

would be eligible now for parole.

THE COURT: I am not going to set a bond. Thank you, Mr. Palmer.

(Whereupon, hearing in the above-entitled matter was concluded at 10:00 o:clock a.m.)

[CAPTION OMITTED IN PRINTING]

STATEMENT OF REASONS FOR DENIAL OF BOND PENDING APPEAL

Pursuant to Rule 9(b), Federal Rules of Appellate Procedure, this Statement of Reasons is entered in conjunction with the Court's denial of defendant's motion for bond pending appeal.

On March 20, 1978, defendant Roberts entered a factual plea of guilty to two counts of unlawful use of the telephone to further the distribution of heroin, 21 U.S.C. §843(b). The plea came after the denial of defendant's motions to suppress identification testimony and to recuse. On April 21, 1978, Defendant was sentenced on each count to a term of from one to four years, and a special parole term of three years, the sentences to run consecutively and to be served in a federal institution. In its allocution filed before sentencing, the Government urged the imposition of the maximum penalty on the basis of defendant's prior criminal record and his culpability as supplier of an extensive heroin distribution network. Defendant's prior criminal record as an adult is as follows:

6/29/62 Washington, D.C.	Petit Larceny	ISS, probation 1 year
6/13/65 Washington, D.C.	Drunk, Disorderly, Housebreaking, Petit Larceny	All nolle prossed
11/22/66	Robbery–Hold-up (Bank)	Count 1: 1-5 years Counts 2 to 12: 5-15 Years, all counts concurrent, Judge Matthews. 2/6/70 original sentence set aside at the direction of Court of Appeals, original sentence reimposed, but Count 2 dismissed.

At the time of sentence, defendant was on parole until 1983 for the bank robbery conviction.

The evidence of his culpability in the heroin distribution ring is equally persuasive. It consists primarily of transcripts of telephone conversations intercepted between defendant Roberts and Charles "Boo" Thornton, a codefendant herein who has pleaded guilty to one count of violating 21 U.S.C. §843(b). On the basis of these conversations, the Government concluded that defendant Roberts acted as a "supplier-wholesaler" for heroin to be transferred to Thornton, and through him to the "street pushers" who make the individual sales, and so charged. Defendant Roberts previously declined to testify against his codefendant Thornton and, despite his plea of guilty, continues to refuse to identify his own sources of supply for heroin.

On the basis of the foregoing factors, the Court has concluded that defendant's prior record, together with

the circumstances of this case, establish "reason to believe that no one or more conditions of release will reasonably assure that the [defendant] will not flee or pose a danger to any other person or to the community." 18 U.S.C. §3148. The danger to the community posed by defendant is that he might resume the narcotics distribution activity with which he was charged in five counts, two of which were the subject of his plea of guilty.* In the language of the pertinent appellate rule, the defendant has not met "[t]he burden of establishing that [he] will not flee or pose a danger to any other person or to the community." Fed. R. App. P. 9(c).

JOHN H. PRATT
United States District Judge

June 16, 1978

*See *Hunsford v. United States*, 353 F.2d 858, 860, 122 U.S. App. D.C. 320, 322 (1965) (per curiam) (every narcotics trafficker a "danger to society").

NOTATION AS TO WHERE THE RELEVANT OPINIONS AND JUDGMENTS BELOW MAY BE FOUND

1. Judgment of affirmance; Petition For a Writ of Certiorari, Appendix A. (hereinafter Pet. App.) 1a-2a
2. Amended judgment; Pet. App. 2a
3. Denial of suggestion for rehearing *en banc*, with separate statements of two judges; Pet. App. 3a-23a.

No. 78-1793

In the Supreme Court of the United States

OCTOBER TERM, 1978

WINFIELD L. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

WILLIAM G. OTIS
JAMES ROLAND DIFONZO
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1793

WINFIELD L. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed the judgment of the district court without opinion (Pet. App. A).

JURISDICTION

The amended judgment of the court of appeals was entered on February 23, 1979. A petition for rehearing was denied on April 30, 1979. The petition for a writ of certiorari was filed on May 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court may consider the defendant's failure to cooperate with the government as a relevant factor in imposing sentence.

STATEMENT

Petitioner was indicted in the United States District Court for the District of Columbia on one count of conspiracy to distribute heroin and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846, and on four substantive counts of unlawful use of a communication facility to distribute heroin, in violation of 21 U.S.C. 843(b). After pleading guilty to two of the substantive counts, petitioner was sentenced to two consecutive terms of one to four years' imprisonment, to be followed by a special parole term of three years.[1] The court of appeals affirmed (Pet. App. 1a-2a).[2] A petition for rehearing en banc was denied, with two judges submitting separate statements (Pet. App. 3a-23a).

At petitioner's sentencing hearing, the prosecutor argued that the court should impose consecutive sentences of 16 to 48 months' imprisonment on each count to which petitioner pleaded guilty (Tr. 11).[3] The prosecutor pointed out that petitioner had previously been convicted for bank robbery, was currently unemployed, and had made large profits as a drug dealer (Tr. 14-16). The prosecutor also told the court that, while petitioner had cooperated to some extent with the government, he had refused to provide information about others involved in the heroin

---

[1]Petitioner had previously pleaded guilty to the conspiracy charge, but his conviction on that plea was subsequently set aside by the court of appeals due to an infraction of Fed. R. Crim. P. 11 (*United States* v. *Roberts*, 570 F. 2d 999 (D.C. Cir. 1977)). On remand, petitioner pleaded guilty to the two substantive counts under 21 U.S.C. 843(b).

[2]The court's judgment order was subsequently vacated and an amended order entered (Pet. App. 2a).

[3]"Tr." refers to the April 21, 1978 transcript of the sentencing hearing.

distribution scheme (Tr. 13-16). At the conclusion of the sentencing hearing, the district court observed (Tr. 19):

> [W]e have considered your case very carefully. We have noted again you were on parole from a bank robbery conviction, which you have had prior involvement with the law. In this case you were clearly a dealer, but you had an opportunity and failed to cooperate with the Government.

ARGUMENT

Petitioner contends (Pet. 6-8) that the district court erred in considering his failure to cooperate with the government as a factor relevant in imposing sentence. This Court recently declined to review that same question in *United States* v. *Miller*, 589 F. 2d 1117 (1st Cir. 1978), cert. denied, No. 78-966 (Mar. 19, 1979), and there is no reason for a different result in the present case.

1. The broad range of factors that may properly be considered by the district court prior to imposing sentence was recently summarized by the Court in *United States* v. *Grayson*, 438 U.S. 41, 53 (1978):

> [I]t is proper—indeed, even necessary for the rational exercise of [sentencing] discretion—to consider the defendant's whole person and personality * * *. The "parlous" effort to appraise "character," * * * degenerates into a game of chance to the extent that a sentencing judge is deprived of relevant information concerning "every aspect of a defendant's life."

Just as the district court's belief that Grayson had perjured himself at trial was a factor relevant to his prospects for rehabilitation, so petitioner's failure (or, conversely, a defendant's willingness) to cooperate with the government could properly be considered by the district court as reflecting petitioner's attitude toward his

offense and his readiness to change his behavior. See *United States* v. *Miller, supra,* 589 F. 2d at 1139. This analysis is supported by the well-established principle that district courts enjoy broad discretion in imposing sentence, and may properly rely on all available sources of information. See *Dorszynski* v. *United States,* 418 U.S. 424 (1974). In making the punishment "fit the offender and not merely the crime" (*Williams* v. *New York,* 337 U.S. 241, 247 (1949)), the sentencing judge may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker,* 404 U.S. 443, 446 (1972); see also 18 U.S.C. 3577 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence").

The record in this case demonstrates that the prosecutor brought to the court's attention, and the court considered, the full range of factors that would reasonably bear on the appropriate length of sentence. Before imposing sentence, the district court noted that petitioner had committed a serious narcotics offense while on parole from a bank robbery conviction, and that he was a dealer, not a mere "consumer," of narcotics.[4] While cooperation with the prosecutor might have justified some degree of

[4]Although petitioner argues (Pet. 6-7) that some defendants may be forced to waive their right against self-incrimination by the district court's consideration of the defendant's "cooperative" attitude, no such issue is presented here. Petitioner voluntarily pleaded guilty long before the issue of lack of cooperation was presented to the sentencing judge. He did not take the witness stand and incriminate himself; instead, he pleaded guilty to avoid trial and obtain the benefit of a reduction of charges.

leniency, petitioner's sentence was fully supported by the severity of his crime and his prior criminal record, wholly apart from his uncooperative conduct. As Judge MacKinnon noted in his separate opinion on petition for rehearing en banc (Pet. App. 21a; emphasis in original):

> The entire record reflects that [petitioner] is a very substantial drug distributor. His sentence of 2 to 8 years is a very light sentence for a drug *distributor* with a prior conviction for bank robbery. Thus, neither the length of the sentence nor the court's statement at sentencing indicated that [petitioner] obtained an "enhanced sentence."

2. Petitioner argues that the courts of appeals are in conflict on the question presented here. We acknowledge that two cases, *United States* v. *Rogers,* 504 F. 2d 1079 (5th Cir. 1974), and *United States* v. *Ramos,* 572 F. 2d 360 (2d Cir. 1978), have held that a district court may not consider a defendant's failure to cooperate as a factor in its sentencing determination.[5] However, these holdings predate *Grayson*. In light of *Grayson's* delineation of the district court's sentencing discretion, it is reasonable to anticipate a change in the approach of these courts. Accordingly, there is no need at present to address the divergence among the lower courts. The courts of appeals that have spoken since *Grayson* (including the Fifth Circuit, which decided *Rogers, supra*) have sustained the district court's broad discretion in this area. See, in

[5]Petitioner also relies on *United States* v. *Garcia,* 544 F. 2d 681 (3d Cir. 1976). However, the court in *Garcia* vacated the defendant's sentences because the trial judge's conduct forced them to risk incriminating themselves as to other offenses in order to obtain leniency in sentencing. Here, in contrast, no question of self-incrimination is presented.

addition to the present case, *United States* v. *Miller, supra; United States* v. *Richardson,* 582 F. 2d 968, 969 (5th Cir. 1978).

Because the holding below is a correct application of this Court's decision in *Grayson*, and any disagreement in the circuits is likely to be eliminated by that decision, review of this issue is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

WILLIAM G. OTIS
JAMES ROLAND DIFONZO
Attorneys

JULY 1979

DOJ-1979-07

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1793

WINFIELD L. ROBERTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

Counsel for Petitioner
Winfield L. Roberts

September 1979

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1793

WINFIELD L. ROBERTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

In its Brief In Opposition the government agrees with Petitioner that the question presented herein is "whether the district court, may consider the defendant's failure to cooperate with the government as a relevant factor in imposing sentence." (Opp. (1)) It further agrees that there is presently a conflict in the circuits on the question presented. (Opp. 5) The Government argues, however, that the two cases holding such sentencing factor improper, predate this Court's holding in *United States v. Grayson,* 438 U.S. 41 (1978), and, that in "light of Grayson's delineation of the district court's sentencing discretion it is reasonable to anticipate a change in the approach of these courts. Ac-

cordingly, there is no need at present to address the divergence among the lower courts." (Opp. 5)

One of the circuits that was supposed to see the light is the Second Circuit which held such sentencing factor improper prior to *Grayson,* in *United States v. Ramos,* 572 F.2d 360 (2d Cir. 1978). The Second Circuit however, contrary to the Government's expectations, has recently adhered to its earlier holding and still finds such sentencing factor improper. *Di Giovanni v. United States,* 596 F.2d 74 (2d Cir. 1979). Reason to grant the writ prayed for is now stronger than ever in order to resolve this nondisappearing conflict in the circuits.[1]

Respectfully submitted,

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900
Counsel for Petitioner
Winfield L. Roberts

---

[1] *Di Giovanni* did not appear in the advance sheets until June 25, 1979, and our original petition was filed on May 30, 1979. We did not come across this case until September 3, 1979, and apparently it was overlooked by the government which filed its opposition herein on July 17, 1979.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1793

WINFIELD L. ROBERTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR WINFIELD L. ROBERTS

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1793

WINFIELD L. ROBERTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR WINFIELD L. ROBERTS

OPINION BELOW

The court of appeals affirmed the judgment of the district court without opinion (Pet. App. 1a-2a).

JURISDICTION

The amended judgment of the court of appeals (Pet. App. 2a) was entered on February 23, 1979. A suggestion for rehearing *en banc* was denied on April

30, 1979 (Pet. App. 3a-23a). The petition for a writ of certiorari was filed on May 30, 1979, and was granted on October 1, 1979. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

QUESTION PRESENTED

Whether the district court may consider the defendant's failure to cooperate with the government as a relevant factor in imposing maximum consecutive prison sentences.

STATEMENT

Petitioner and Charles J. Thornton were jointly indicted in the United States District Court for the

District of Columbia in a five count indictment including one count of conspiracy and four counts charging unlawful use of a telephone to facilitate the distribution of heroin. 21 U.S.C. 841(a), 846, 843(b). In 1975 petitioner pleaded guilty to the conspiracy count and received a sentence of four to fifteen years imprisonment, a three year special parole term, and a $5,000 fine. The conviction was vacated on appeal because the government had not fully disclosed the details of the plea agreement to the district court. *United States v. Roberts*, 570 F.2d 999 (D.C. Cir. 1977). Upon remand, petitioner pleaded guilty to two of the four counts alleging unlawful use of the telephone which carried a maximum penalty of four years imprisonment and a $30,000 fine on each count. He was given maximum four year consecutive sentences totalling two to eight years imprisonment and a three year term of special parole.[1] Although the conviction was summarily affirmed and a suggestion for rehearing *en banc* was denied, two judges submitted opposing statements concerning the merits of rehearing the case (Pet. App. 3a-23a).

Prior to the first sentencing, the government filed a written allocution outlining a drug distribution scheme between petitioner and Thornton (A. 10-21). The allocution—which sought "a substantial term of incarceration and fine"—concentrated on the nature of the case, petitioner's role in it and his prior conviction for bank robbery as the grounds for its recommendation. That lengthy document but adumbrated the final

[1] In its amended judgment, the court of appeals vacated this term of special parole because it was not authorized by the statute, 21 U.S.C. 843(b). (Pet. App. 2a.)

sentencing refrain of the prosecutor, *viz.*, its sole reference to *cooperation* as follows:

> ". . . [Petitioner] was told that we were desirous of obtaining his cooperation in testifying against Thornton, and that the nature and extent of his cooperation would be determinative of the charges which could be brought against him." (A. 16). (footnote omitted.)

In a concise memorandum filed prior to the sentencing proceeding now under review, the government referred the district court to its previous written allocution and sought the imposition of maximum consecutive sentences. No mention was made of petitioner's failure to cooperate with the government as a sentencing factor (A. 22-23).

On behalf of petitioner a motion was filed seeking, *inter alia*, concurrent sentences on the two phone counts (A. 3-5). The pleading noted that, in the experience of counsel, concurrent sentences were the common practice in district court in cases such as this:

> "Furthermore, we know of no case in this jurisdiction where consecutive sentences were imposed for violations of 21 U.S.C. §843(b) (counts 2 and 5) and we have found no appellate opinion from any circuit wherein telephone counts resulted in anything but concurrent sentences as a matter of fact." (A. 4-5).

In its written response the government did not dispute these factual assertions of sentencing practice (A. 5-8). At the sentencing hearing, counsel for petitioner echoed his written motion by observing once again that to his knowledge no district court judge had ever imposed consecutive sentences on guilty pleas to

two telephone counts (A. 28). Indeed, the prosecutor stated that in seeking maximum consecutive sentences the government was "going against a rule of general usage, of customary practice in this courthouse." (A. 34) With that, the prosecutor for the first time launched his primary reason for seeking that extraordinary sentence:

> ". . . I haven't always been as harsh in asking for a particular sentence as I am in this case, and I would like to explain why the Government has taken this reason, so as not to appear as a Simon Legree." (A. 34-35)
>
> * * * *
>
> "We solicited Mr. Roberts' cooperation to testify in the Grand Jury and at trial against Mr. Thornton. We promised him that the nature and extent of his cooperation would be made known. Suffice it to say what we offered him was a plea bargain on a silver platter, from which he would have emerged perhaps with some jail time, but with certainly a plea offer to a much less serious offense than what has ultimately transpired in the case.
>
> Thereafter he began to cooperate, as Mr. Palmer noted. He told us what the terms 'street' and 'half street' meant. He told us how he delivered drugs in his girlfriend's Jaguar to Mr. Thornton. He told us a number of things which incriminated him. But when we asked him to go a step further and identify the person or persons from whom he was getting the drugs, and the location, and to lay out the conspiracy and identify other co-conspirators who were involved with them, he balked.
>
> At that point, despite repeated entreaties to secure his cooperation to go that extra step, he adamantly refused. And of course what resulted

was an indictment charging him with conspiracy, and only five telephone counts, though there were a maximum of 13 calls we could have indicted him for.

Throughout the long process that has occurred from June of 1975 when he first came into my office, up to today, he still has refused to cooperate.

So as we stand here today as a prosecutor I am not in a position as I would be in many cases, in dealing with defendants like Mr. Roberts, and cases like this involving drugs, to come to the Court and say, Your Honor, we would ask you to take into account some extenuating and mitigating circumstances, that the defendant has cooperated by providing us with certain information. He has stonewalled it.

So we find it somewhat ironic for counsel to plead on Mr. Roberts' behalf, and to ask for probation, when a defendant over a course of many, many years, knowing what he faces, and knowing that we desired the information, still refuses to disclose it." (A. 35-36).

The prosecutor then alluded to the more traditional factors in seeking this rare sentence, *e.g.*, petitioner's supplier role in the case for purely monetary purposes and his 1968 bank robbery conviction. In concluding his allocution, the prosecutor once again centered on petitioner's failure to cooperate in the investigation–a refusal which appeared to personally irritate him:

> "When Mr. Roberts had an opportunity to get a deal on very good circumstances, he threw it up in our face." (A. 37)
>
> * * * *
>
> "Your Honor, when you take into account, the seriousness of this offense, . . . , where he himself was not an addict, where he had been unemployed, . . . , where he refused to assist the Government and thereby brought down on his head charges much more severe than would have been brought down, its the Government's feeling that the appropriate sentence in this case is as we suggested." (A. 38)

After this constant hammering away at the failure-to-cooperate theme, the district court was persuaded thereby, and relied upon this as a substantial factor in imposing maximum consecutive sentences on petitioner:

> "THE COURT: Mr. Roberts, we have considered your case very carefully. We have noted again you were on parole from a bank robbery conviction, which you have had prior involvement with the law. In this case you were clearly a dealer, but you had an opportunity and failed to cooperate with the Government. Accordingly, it is the judgment of the Court that on each of these two counts you be sentenced to a term of one to four years, that those counts be consecutive, and in addition that there shall be a three-year term of special parole. We are not imposing a fine." (A. 40-41)

ARGUMENT

IT IS IMPERMISSIBLE FOR A DISTRICT COURT TO RELY ON THE DEFENDANT'S FAILURE TO COOPERATE WITH THE GOVERNMENT AS A SUBSTANTIAL SENTENCING FACTOR.

As the record reflects, the district court imposed maximum consecutive prison terms upon petitioner

relying in substantial part on the latter's refusal to cooperate with the government. That conclusion inexorably flows from a review of the prosecutor's forceful allocution, the conceded rarity of consecutive sentences on pleas to several phone counts, and, the responsive statement by the district court immediately prior to the imposition of sentence that failure "to cooperate with the Government," was one of the three factors it was relying upon. Because the sentence was thus, substantially influenced by an impermissible determinant it must be vacated. *Di Giovanni v. United States*, 596 F.2d 74 (2d Cir. 1979).

Simply put, the district court erroneously punished petitioner for exercising his Fifth Amendment right against self-incrimination. In the first encounter between petitioner and the prosecutor the latter advised him pursuant to the requirements of *Miranda*,[2] that he had the right, *inter alia*, to remain silent and that anything he said could be used against him (A. 16). So cautioned, petitioner made several statements in which he incriminated himself, but adamantly refused to go further; declining to testify against his projected co-defendant, Thornton, or identify the person or persons from whom he had received the heroin (A. 16-17, 35-36). He was thereafter arrested and indicted in the present case. Subsequent to his making these initial incriminating statements petitioner—now represented by counsel—once again consistently refused to incriminate himself any further by detailing the full contours of his criminality (A. 35-36). This voluntary cessation of the flow of damaging information was a foreseen circumstance dealt with by the Court in *Miranda*:

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege. 384 U.S. at 473-4 (footnote omitted).
>
> Opportunity to exercise these rights must be afforded to him throughout the interrogation." *Id.* at 479.

We cannot believe that our system of criminal justice permits petitioner to be punished in substantial part because he properly relied on accurate legal advice first imparted to him by the prosecutor. Indeed, it seems in retrospect somewhat anomalous for the prosecutor—who remained the same throughout—to have so fervently urged the imposition of maximum consecutive sentences for non-cooperation, when petitioner but took him at his word and remained silent.

Furthermore, petitioner's guilty pleas have no bearing on the invalidity of his sentence for those pleas did not abrogate his right to remain silent. In the first place, there is substantial support for the proposition that even as to those matters encompassed by a guilty plea, the privilege remains *prior to* sentencing. *United States v. Houghton*, 554 F.2d 1219, 1222 (1st Cir. 1977) (Witness could refuse to testify "until after he was sentenced."). This results from the fact that the "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212 (1937). See *United States v. Ross*, 464 F.2d 376, 379 (2d Cir. 1972). Rule 11(e), (6), Fed. R. Crim. P., underscores this by providing that

evidence of a guilty plea and statements made by a defendant in connection therewith are not admissible in evidence against him, should the plea later be withdrawn, *i.e.*, when there is no imposition of sentence. It is clear that petitioner could, therefore, legally remain silent and not be compelled to testify prior to the imposition of sentence–it was, accordingly impermissible for him to have been penalized for exercising his constitutional guarantee against self-incrimination. In these circumstances, the Court should quickly shut the door on this flagrant method of attenuating by its mere exercise "one of our Nation's most cherished principles."[3]

Assuming arguendo that petitioner's March 20, 1978, guilty pleas resulted in the waiver of his Fifth Amendment rights,[4] that waiver did not extend to the information sought by the prosecutor. At the sentencing of April 21, 1978, the latter fully explained that his concept of cooperation included testimony by petitioner against his co-defendant Charles J. Thornton and for him to "identify the person or persons from whom he was getting the drugs, and the location, and to lay out the conspiracy and identify other co-conspirators who were involved with them." (A. 36) It is readily apparent that such information could and would implicate petitioner in other serious crimes. The indictment

[3] *Miranda v. Arizona, supra*, at 457-458.

[4] Although we are confident in our argument that a guilty plea does not dissolve Fifth Amendment rights prior to sentence, dicta in opinions not considering the precise issue have pointed the other way. *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *United States v. Sanchez*, 459 F.2d 100, 103 (2d Cir. 1972).

herein charged petitioner and Thornton with a narcotic conspiracy from March 10, 1975, through March 16, 1975, along with four substantive counts charging them with illegal use of the telephone within the same six day time frame. The government's theory, repeatedly announced with charts and the like, was that petitioner supplied Thornton with drugs which the latter sold through his intermediaries (A. 14-16). Were petitioner to fully and truthfully testify against Thornton, he would necessarily incriminate himself in numerous illegal narcotic distributions to Thornton in violation of 21 U.S.C. 841(a). Were he further to "lay out the conspiracy" in detail, he would also incriminate himself as to additional substantive offenses with his "supplier(s)" and in one or more conspiracies in this and possibly other jurisdictions. Since there is not one scintilla of doubt that prosecutions for the above-described offenses survived petitioner's guilty pleas,[5] his Fifth Amendment privilege remained intact insofar as the requested "cooperation" was concerned. Thus, however viewed, petitioner was impermissibly punished in substantial part because he sought refuge in his normally unfettered right to remain silent.

In remaining silent about his confederates petitioner was not called upon to detail his reasons for doing so; indeed, that judicial inquiry would itself have been

[5] For a sampling of the legion of cases supporting this proposition, see *Pinkerton v. United States*, 328 U.S. 640 (1946); *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Hodges*, 502 F.2d 586 (5th Cir. 1974); *United States v. Gloria*, 494 F.2d 477 (5th Cir. 1974); *United States v. Johnson*, 488 F.2d 1206 (1st Cir. 1973); *Nolan v. United States*, 423 F.2d 1031, 1047-8 (10th Cir. 1969).

improper. It goes without saying that an informer's life is not free from reprisal and it is universally understood that this fear of bodily harm ordinarily inclines one to resist being pressed into so dangerous a government service. In his statement as to why he voted for rehearing *en banc*, Judge Bazelon observed: "[Petitioner] balked only when asked to identify his powerful suppliers, fearing that to do so would endanger his life. . . ." (Pet. App. 7a) See on this score, *United States v. Toombs*, 497 F.2d 88, 90 (5th Cir. 1974) (Heroin conspiracy, informer shot three times, n. 1); *Swanner v. United States*, 406 F.2d 716 (5th Cir. 1969) (Informer's house bombed injuring him, his wife and two grandchildren); *United States v. Pacelli*, 491 F.2d 1108 (2d Cir. 1974) (Witness in narcotics case stabbed to death and body burned); *In Re Quarles*, 158 U.S. 532 (1895) (Informer beat, bruised, shot at "and otherwise ill-treated."); *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534 (C.A. N.Y. 1958) (Informer murdered.) In weighing and rejecting the offer put to him, petitioner was mindful of the fact that his role was to be that of what we may term a high visibility informant as opposed to a subliminal one. The latter does not usually surface, but rather is employed behind the scenes turning up anonymously in search warrants. As to this type of informant see *Rugendorf v. United States*, 376 U.S. 528 (1964). The prosecutor, however, envisioned more of a front line role for petitioner including testimony at a public trial which, of course, greatly escalated the danger to his safety. Who can fault petitioner for declining the invitation to cooperate in these circumstances–much less penalize him. In conjunction with this, when we look at the benefits to be

accorded him were he to cooperate and give up his Fifth Amendment rights, we see that the prosecutor tendered him a lesser plea "from which he would have emerged perhaps with some jail time," and an understanding that "the nature and extent of his cooperation would be made known." (A. 35) For these benefits petitioner was to "lay out the conspiracy" and incriminate himself in other crimes without the insulation provided by a grant of immunity. If the prosecutor was so adamant about securing petitioner's cooperation, he should have chosen the one route authorized by Congress, *i.e.*, immunity from prosecution pursuant to 18 U.S.C. 6002 in exchange for petitioner's Fifth Amendment rights. If once immunized the latter still balked, then, and only then, could the district court properly punish him for his failure to cooperate in the investigation.

In ruling on the appropriateness, *vel non*, of considering a defendant's failure to inform in imposing sentence, the courts of appeals are divided on the issue and, indeed, some circuits appear internally divided. In commenting on the District of Columbia Circuit, Judge Bazelon observed:

> "In *United States v. McCord*, we suggested that a trial judge's consideration of defendant's failure to cooperate might necessitate vacation of sentence. Only a short time later in *United States v. Liddy*, a different panel concluded that that same factor was properly considered in imposing sentence." (Pet. App. 6a, footnotes omitted.)

In *United States v. Ramos*, 572 F.2d 360 (2d Cir. 1978), the Second Circuit was "more than somewhat in doubt" that the sentence was not influenced by the

defendant's refusal to cooperate and testify for the government. Since his refusal to testify "may have been an important factor in the sentence," the court vacated the sentence and ordered resentencing before a different judge. Perhaps a more comprehensive statement in the case is to be found in the concurring opinion of Judge Lumbard. He believed that if the government wanted the defendant's cooperation, it should have granted him immunity. Furthermore, cases permitting a trial court to mitigate a sentence because of cooperation were, he observed, not in point. "It is one thing to extend leniency to a defendant who is willing to cooperate with the government; it is quite another thing to administer additional punishment to a defendant who by his silence has committed no additional offense." In *Di Giovanni v. United States, supra*, Judge Lumbard writing for the court, found that the sentencing judge gave improper consideration to the defendant's refusal to cooperate with the government and vacated the sentence, ordering resentencing before another judge. In commenting on the government's argument that the district court properly considered the defendant's refusal to cooperate as evidence that he did not wish to turn away from his life of crime, the court observed:

> "... to permit the sentencing judge to infer, such lack of desire from a defendant's refusal to provide testimony would leave little force to the rule that a defendant may not be punished for exercising his right to remain silent. In any event, refusal to testify, particularly in narcotic cases, is more likely to be the result of well-founded fears of reprisal to the witness or his family."

Judge Lumbard again suggested that the government

could have given the defendant immunity if it wanted his testimony:

> "Had Di Giovanni been given immunity and still refused to testify, he could of course have been punished for contempt of court. For whatever reason, the government chose [not to do so], and consequently it cannot now argue that Di Giovanni's refusal to testify warranted imposition of a more serious sentence."

In *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979)—a notorious drug conspiracy case—all appellants urged that the sentences should be vacated because the trial court improperly considered their failure to cooperate in imposing sentence. Writing for the majority, Judge Moore upheld the sentences although lack of cooperation was one factor the trial court did consider. In an apparent split from Judge Lumbard's view, the opinion went on to state:

> "In imposing sentence the court may consider a defendant's cooperation or lack thereof as long as *all* factors are considered." 604 F.2d at 154

See also, *United States v. Vermeulin*, 436 F.2d 72 (2d Cir. 1970), wherein Judge Moore writing for the court, approved of a harsher sentence imposed because of the defendant's uncooperative attitude. These cases from the Second Circuit demonstrate, at least, the great currency of the present issue and the differing views it generates among judges. Insofar as the other circuits are concerned, compare, *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974) (Lack of cooperation improper factor); and *United States v. Garcia*, 544 F.2d 681 (3rd Cir. 1976) (same); *with, United States v. Miller*, 589 F.2d 1117 (1st Cir. 1978) (Lack of cooperation-proper

factor); and *United States v. Chaidez-Castro*, 430 F.2d 766 (7th Cir. 1970) (same).

The government seeks to prevail herein by urging that *Grayson v. United States*, 438 U.S. 41 (1978), upon reasonable interpretation supports the judgment below. See Opp. 3-6, Br. for Appellee 20-23. In *Grayson*, the defendant testified in an escape case that he did, in fact, escape from confinement, but defended on the theory that he was propelled into doing so by the fear of imminent violence directed at him by another inmate. Upon conviction, the district court sentenced him to a term of two years imprisonment, consecutive to his unexpired sentence, relying in part on the established fact that his defense "was a complete fabrication. . . ." In upholding the propriety of this sentencing factor, the Court observed:

> "A defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing." 438 U.S. at 50.

In light of the limitless source material available to a sentencing judge, 18 U.S.C. 3577, flagrantly lying under oath was a serious transgression properly to be considered by the district court, especially since that mendacity bore a rational connection to the negative prospects for the defendant's rehabilitation. In seeking to prohibit the sentencing judge from considering this highly relevant information which revealed an important aspect of the defendant's life, the latter propounded two arguments which the Court, upon analysis, found inadequate to their task. Grayson urged that (1) the

sentence violated due process because it punished him for the crime of perjury without a trial and (2) permitting consideration of perjury will "chill" defendants from testifying on their own behalf. As to (1), the Court held that Grayson was not being punished because he committed what may be labeled a crime, but rather, he was being punished because he lied under oath in front of the sentencing judge; an extremely antisocial act warranting sentencing consideration—the fact that his conduct may have also amounted to a crime was merely coincidental. As to (2), the Court held that a defendant has the absolute right to testify or not to testify, but, if he chooses to testify he has no protected right to commit perjury. Awareness that willful and material falsehoods might result in additional punishment, "cannot be deemed to affect the decision of an accused but unconvicted defendant to testify truthfully in his own behalf." 438 U.S. at 55.

In viewing the issue at hand, it can be said that cooperation with the authorities to ferret out serious narcotic violators, is a laudable endeavor which bears a rational connection to a defendant's willingness to shape up and change his behavior in a positive direction. Thus, such voluntary cooperation—which thereby waives Fifth Amendment rights—is properly considered by a sentencing judge. *United States v. Malcolm*, 432 F.2d 809, 817 (2d Cir. 1970). The converse, however, is not equally true, because there is no rational connection between a defendant's refusal to cooperate and a dimming of his prospects for rehabilitation. Even if such connection is found to exist, refusal to cooperate is still a factor properly barred from consideration by the sentencing judge.

A defendant who admits his guilt and pleads guilty, does not deepen his rift with society because he thereafter refuses to cooperate and expose himself or his family to the possibility of death or serious bodily injury. It would be a harsh society, indeed, which sought to punish one because he declined to become an available target in the government's war on crime. In this light, refusal to cooperate has zero bearing on a defendant's rehabilitative possibilities.

Should it be successfully argued that petitioner cannot rely upon this apprehension of harm as a legitimate inference to be drawn from his silence, we urge, that his failure to cooperate was inappropriately considered, in any event, for the reason that it trenched upon the exercise of his Fifth Amendment right to remain silent. In balancing the public's right to know against petitioner's constitutional rights, the former of necessity must yield. Full force and effect must be given to his unfettered exercise of so treasured a privilege; especially when its invocation, at the bottom line, did not seriously interfere with the public's access to petitioner's knowledge. Judicious use of the immunity statutes by the government would have righted this constitutionally protected imbalance and readily unleashed the sought-after facts.

In conclusion, whereas Grayson chose to act in a situation where he was not legally required to act but did so mendaciously, he appropriately suffered the consequences; on the other hand, petitioner chose not to act in a situation where he was not legally required to act and, accordingly, should not be penalized for literally doing nothing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

ALLAN M. PALMER
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900
Counsel for Petitioner

November 1979

FOR ARGUMENT

No. 78-1793

In the Supreme Court of the United States

OCTOBER TERM, 1979

WINFIELD L. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

STEPHEN M. SHAPIRO
Assistant to the Solicitor General

JAMES R. DIFONZO
WADE S. LIVINGSTON
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

Argument—Continued

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Constitution, statutes and rules:

Constitution, statutes and rules—Continued

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1793

WINFIELD L. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The court of appeals affirmed the judgment of the district court without opinion (Pet. App. 1a-2a).

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1978, and was amended on February 23, 1979 (Pet. App. 1a-2a). A petition for rehearing was denied on April 30, 1979 (Pet. App.

3a-4a). The petition for a writ of certiorari was filed on May 30, 1979, and was granted on October 1, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court improperly considered, as one relevant factor in imposing sentence, petitioner's refusal to cooperate with the government by identifying the persons who supplied him with heroin.

STATUTES INVOLVED

21 U.S.C. 843 provides in pertinent part:

> (b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter [provisions concerned with drug abuse prevention]. Each separate use of a communication facility shall be a separate offense under this subsection. * * *
>
> (c) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both * * *.

21 U.S.C. 850 provides in pertinent part:

> * * * no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence under this subchapter or subchapter II of this chapter.

STATEMENT

1. This case arises from a continuing investigation by the Major Crimes Division of the Office of the United States Attorney for the District of Columbia into a large-scale heroin distribution conspiracy (App. 10-12, 14-16). During the course of the investigation, it was observed that the persons under surveillance frequently used a green Jaguar automobile to transport heroin (App. 35). The owner of the Jaguar informed the investigators that she permitted her boyfriend, petitioner Roberts, to use the car (App. 29, 35). Petitioner, who had voluntarily accompanied his girlfriend to the office of the United States Attorney, was then interviewed. Although he was not arrested or taken into custody, he was given *Miranda* warnings and his cooperation in investigating the case was requested (App. 35, 16-17; Jan. 28, 1977 Tr. 37; Oct. 17, 1975 Tr. 7-12, 27-40).[1]

Petitioner was advised by the prosecutor that "the nature and extent of his cooperation would be made known" (App. 35) and would be determinative of the charges that would be brought against him (App.

---

[1] "Oct. 17, 1975 Tr." refers to the transcript of proceedings to determine the voluntariness of petitioner's waiver of his *Miranda* rights. "Jan. 28, 1977 Tr." refers to the transcript of proceedings following petitioner's motion to withdraw his first guilty plea.

16). The prosecutor sought petitioner's cooperation in testifying against one of his co-conspirators (Charles Thornton), and in identifying the persons who supplied the heroin that he distributed (App. 16-17, 30, 35-36).

During this interview, petitioner freely admitted his own involvement in the heroin distribution conspiracy. He confessed that he was one of the participants in certain intercepted telephone conversations in which heroin transactions had been planned (App. 16). He also admitted that he used his girlfriend's Jaguar to deliver the heroin and explained the meaning of various code words used in the intercepted telephone conversations (App. 16-17, 36). Petitioner's confession was subsequently found to be the result of a knowing and voluntary waiver of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). See App. 16 n.4; Oct. 17, 1975 Tr. 40. When petitioner was asked to name his suppliers and co-conspirators, however, he refused. His explanation for failing to cooperate in providing the names of his suppliers and co-conspirators was simply that he "wasn't that involved in it" (App. 30). Despite repeated requests, he refused to provide the desired information (App. 36, 38; Oct. 17, 1975 Tr. 12).

2. Petitioner subsequently was arrested and indicted in the United States District Court for the District of Columbia on one count of conspiring to distribute heroin, in violation of 21 U.S.C. 846 and 841, and on four counts of using a telephone to facilitate the distribution of heroin, in violation of 21 U.S.C.

843(b). Following the indictment, plea bargaining discussions ensued (Jan. 28, 1977 Tr. 17-18). During this period, the Assistant United States Attorney attempted to bargain with defense counsel to obtain petitioner's cooperation in identifying his heroin suppliers (*ibid.*). All of the government's proposals for a negotiated guilty plea were rejected (*id.* at 19-21).

On the day of trial, however, the parties consummated a plea agreement under which petitioner pleaded guilty to the conspiracy count and the remaining substantive counts against him were dismissed. The district court imposed a sentence of four to 15 years' imprisonment, a three year special parole term, and a $5,000 fine (App. 22). Petitioner subsequently appealed from this conviction, contending that the terms of the plea agreement were not adequately disclosed to the district court. The court of appeals reversed petitioner's conviction on that ground and permitted him to withdraw his guilty plea. *United States* v. *Roberts*, 570 F.2d 999 (D.C. Cir. 1977).

After the case was remanded to the district court, petitioner once again pleaded guilty, this time to two of the substantive counts in the indictment charging unlawful use of telephone facilities to distribute heroin. The government agreed to dismiss the remaining counts but reserved the "unconditional right to allocute" in favor of a prison sentence that it deemed appropriate (App. 22).

3. Prior to petitioner's sentencing hearing, the government filed a "memorandum on sentencing"

recommending that "maximum consecutive sentences be imposed" (App. 22-23).[2] The government sought a 16 to 48-month sentence on each of the counts to which petitioner pleaded guilty, as well as a $5,000 fine.[3] In explanation of this recommendation, the government referred to petitioner's "prior criminal record" and his culpability as a "supplier" of narcotics (App. 23). The sentencing memorandum also incorporated the reasons set forth in the more extensive memorandum filed prior to petitioner's first sentence (App. 10-21, 23). That memorandum discussed in detail the reasons for imposing a substantial prison term. The memorandum noted that petitioner previously had been convicted on one count of unauthorized use of a vehicle, as well as five counts of federal bank robbery and five counts of local bank robbery (App. 17-21).[4] The sentencing memorandum also pointed out that petitioner was on parole from these convictions when he engaged in the heroin distribution conspiracy (App. 17-21). It further explained that petitioner had been unemployed since he was released from prison despite the fact that he was a young man in good health. Even though un-

[2] Under 21 U.S.C. 843(b), each use of the telephone to facilitate heroin distribution is a separate offense, and consecutive sentences are therefore within the power of the court.

[3] Under 18 U.S.C. 4205(b), the district court is empowered to impose as a minimum sentence one-third of the statutory maximum—in this case, 16 months on each count.

[4] Petitioner served five and one-half years in prison as a result of these convictions (App. 31).

employed, petitioner supported himself in a lavish manner through his heroin dealings (App. 18-19). The sentencing memorandum also referred briefly to petitioner's failure to cooperate by identifying the persons who supplied him with the heroin (App. 17).

4. During the sentencing hearing in the district court, petitioner's counsel argued that the court should impose concurrent rather than consecutive sentences, contending that he was unaware of any prior case in which consecutive sentences had been imposed in similar circumstances (App. 28). Counsel also referred to the fact that petitioner had given the government some assistance by admitting his own criminal activities (App. 29). Counsel gave as petitioner's reason for refusing to identify the other conspirators that he "wasn't that involved in it" (App. 30). He concluded by arguing that the court should give serious consideration to probation in lieu of further imprisonment (App. 32-34).

In reply to defense counsel's arguments, the prosecutor explained his reasons for requesting consecutive prison sentences.[5] The prosecutor noted that the sentence that he recommended was less severe than that imposed after petitioner's first guilty plea (App. 34). He explained that consecutive sentences were appropriate because petitioner had previously been convicted on multiple counts of bank robbery and because petitioner was guilty of distributing heroin,

[5] The prosecutor pointed out that, under his sentencing recommendation, petitioner would be eligible for parole in 11 months due to his credit for prior time served (App. 34).

as opposed to merely using it (App. 37-38). In addition, the prosecutor responded to defense counsel's remarks about the extent of petitioner's cooperation with the government (App. 35-36):

> We solicited Mr. Roberts' cooperation to testify in the Grand Jury and at trial against Mr. Thornton [a co-conspirator]. We promised him that the nature and extent of his cooperation would be made known. Suffice it to say what we offered him was a plea bargain on a silver platter, from which he would have emerged perhaps with some jail time, but with certainly a plea offer to a much less serious offense than what has ultimately transpired in the case.
>
> Thereafter he began to cooperate, as Mr. Palmer [petitioner's counsel] noted. He told us what the terms "street" and "half street" meant. He told us how he delivered drugs in his girlfriend's Jaguar to Mr. Thornton. He told us a number of things which incriminated him. But when we asked him to go a step further and identify the person or persons from whom he was getting the drugs, and the location, and to lay out the conspiracy and identify other co-conspirators who were involved with them, he balked.
>
> At that point, despite repeated entreaties to secure his cooperation to go that extra step, he adamantly refused. And of course what resulted was an indictment charging him with conspiracy, and only [four] telephone counts, though there were a maximum of 13 calls we could have indicted him for.

* * * * *

> So as we stand here today, as a prosecutor I am not in a position as I would be in many cases, in dealing with defendants like Mr. Roberts, and cases like this involving drugs, to come to the Court and say, Your Honor, we would ask you to take into account some extenuating and mitigating circumstances, that the defendant has cooperated by providing us with certain information. He has stonewalled it.
>
> So we find it somewhat ironic for counsel to plead on Mr. Roberts' behalf, and to ask for probation, when a defendant over a course of many, many years, knowing what he faces, and knowing that we desired the information, still refuses to disclose it.

The district court imposed a sentence different from that sought by either the prosecutor or defense counsel. In explaining its sentence, the court stated the following (App. 40-41):

> Mr. Roberts, we have considered your case very carefully. We have noted again you were on parole from a bank robbery conviction, which you have had prior involvement with the law. In this case you were clearly a dealer, but you had an opportunity and failed to cooperate with the Government. Accordingly, it is the judgment of the Court that on each of these two counts you be sentenced to a term of one to four years, that those counts be consecutive, and in addition that there shall be a three-year term of special parole. We are not imposing a fine.

5. On appeal, petitioner argued that the trial judge committed error by failing to recuse himself after

the court of appeals' decision reversing petitioner's first conviction. In the course of arguing that the trial judge was obligated to recuse himself, petitioner raised, for the first time, the contention that the district court had improperly considered the extent of his cooperation in imposing sentence (Ct. App. Br. 15-16). Petitioner also asserted that he "could not be penalized for adhering to his fifth amendment rights and refusal to implicate himself in possibly another conspiracy with other persons unknown" (*id.* at 16).

The court of appeals affirmed petitioner's conviction and sentence without opinion (Pet. App. 1a-2a).[6] A petition for rehearing was subsequently denied, with two judges submitting separate statements.

Judge Bazelon, who voted for rehearing en banc, stated that the district court improperly considered petitioner's refusal to cooperate "as a justification for imposing a more severe sentence" (Pet. App. 6a). Without citation to the record, Judge Bazelon asserted that petitioner "balked only when asked to identify his powerful suppliers, fearing that to do so would endanger his life and possibly incriminate himself in additional conspiracies or criminal activities without benefit of immunity from prosecution" (*id.* at 7a). He also asserted that the prosecutor allocuted for a

[6] Based on the government's stipulation that a special parole term was not authorized by 21 U.S.C. 843(b), that portion of petitioner's sentence was vacated by the court of appeals (Pet. App. 2a).

substantial sentence "in order * * * to punish the defendant for noncooperation" (*id.* at 10a-11a).

Judge MacKinnon filed a separate statement replying to Judge Bazelon (Pet. App. 21a-23a). Judge MacKinnon pointed out that nothing in the record supports the assertion that petitioner received an "enhanced sentence for his failure to cooperate" (*id.* at 21a). He also observed that petitioner's sentence of 2 to 8 years imprisonment is "a very light sentence for a drug *distributor* with a prior conviction for bank robbery. Thus, neither the length of the sentence nor the court's statement at sentencing indicated that Roberts obtained an 'enhanced sentence'. He obtained a sentence that is minimal for his type of continuing egregious conduct * * *" (*ibid.*; emphasis in original).

Judge MacKinnon also observed that this Court's decision in *Brady* v. *United States*, 397 U.S. 742 (1970), recognized the propriety of plea bargaining for cooperation that promotes the administration of justice (Pet. App. 22a). He added that "[w]hether these situations are viewed as facing a more severe sentence for not cooperating or a more lenient sentence for cooperating, the situation is merely two sides of the same coin" (*id.* at 22a-23a). In either event, Judge MacKinnon concluded, the extent of a defendant's cooperation is a relevant factor in exercising the district court's sentencing discretion (*ibid.*).

SUMMARY OF ARGUMENT

I.

The district court properly considered petitioner's refusal to cooperate with the authorities as one relevant factor in imposing sentence. Under 21 U.S.C. 843(c), the district court had a broad range of sentencing options, extending from simple probation to consecutive 16-48 month prison terms with $30,000 fines for each conviction. The court imposed a substantial sentence in light of petitioner's admitted activity as a heroin distributer, his parole status following his release from imprisonment for conviction on ten counts of bank robbery, and his adamant refusal to cooperate with the authorities in identifying the persons who provided him with heroin and who continued to distribute heroin within the community.

While it is not clear whether petitioner's sentence was in fact materially affected by his failure to cooperate with the authorities, that consideration was directly relevant to the exercise of sentencing discretion. His failure to cooperate showed that he was unwilling to take steps to mitigate the antisocial effect of his illegal activities—a factor that bears directly on his amenability to reform and rehabilitation. A substantial prison sentence was also required to protect the community. If petitioner had cooperated with the authorities by identifying his suppliers, this would have terminated his relationship with his criminal associates. Petitioner's refusal to cooperate sug-

gested that he was unwilling to sever his prior relations. The sentencing court could properly infer that someone so disposed would be in a position to return to the criminal conspiracy following his release from prison, a consideration demanding a substantial period of incarceration to protect the public.

Although petitioner now argues that his refusal to cooperate was motivated by a fear of "retaliation" or "self-incrimination," neither of these explanations was ever presented to the prosecutor or the sentencing court. Instead, petitioner simply "stonewalled" the government; the only explanation offered to the sentencing court for his silence was the implausible one that he was not "that involved" in the conspiracy and could not therefore assist in identifying his suppliers. His belated justifications for refusing to cooperate do not undermine his sentence, since he and his attorney had ample opportunity to present all mitigating information prior to the imposition of sentence.

Congress has prescribed that "no limitation shall be placed on the information" that the district court may "receive" and "consider" in imposing sentence (21 U.S.C. 850). This Court has repeatedly held that the trial court may consider evidence bearing on "'every aspect of a defendant's life'" before pronouncing sentence. *United States* v. *Grayson*, 438 U.S. 41, 53 (1978). A defendant's refusal to cooperate with authorities in apprehending co-conspirators who continue to cause serious harm to the community is a relevant datum under *Grayson*.

"Consideration of failure to cooperate with authorities is certainly germane to an evaluation of a defendant's attitude toward society." *United States* v. *Miller*, 589 F.2d 1117, 1139 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979).

Petitioner acknowledges that the extent of a convicted defendant's cooperation with the government is relevant in considering whether to grant leniency, but he asserts that it is not a proper factor in considering "additional punishment." However, there is no indication that the court imposed "additional punishment" on petitioner due to his failure to cooperate. As the colloquy during petitioner's sentencing hearing shows, the prosecutor described the extent of petitioner's cooperation in response to defense counsel's arguments on that subject. The prosecutor explained that leniency—probation or concurrent sentences—would not be appropriate in the present case due to petitioner's admitted activities as a narcotics dealer, his extensive prior criminal record, and his failure to cooperate. Moreover, as Judge MacKinnon properly noted, the sentence actually imposed on petitioner, viewed only in light of the crime that he committed and his past criminal record, was not a severe or disproportionate one.

In any event, failure to cooperate is a proper consideration in deciding whether to impose "additional punishment." The extent of a defendant's cooperation bears directly on his attitude toward society, his continuing dangerousness, and his amenability to reform. There is no logical reason why cooperation should be

relevant but non-cooperation irrelevant in determining an appropriate sentence. "In imposing sentence the Court may consider a defendant's cooperation or lack thereof as long as *all* factors are considered. Thus, reference to a lack of cooperation as a factor does not render a sentence subject to resentencing because of any infirmity therein." *United States* v. *Barnes*, 604 F.2d 121, 153-154 (2d Cir. 1979), petition for cert. pending, No. 79-261 (citation omitted; emphasis in original).

II.

Petitioner's refusal to cooperate with the authorities did not constitute an exercise of Fifth Amendment rights. Throughout the three-year period that followed petitioner's initial interview and preceded imposition of his sentence, petitioner never suggested that his refusal to cooperate rested on Fifth Amendment grounds or that he was declining to incriminate other persons because he was fearful of implicating himself in additional crimes. Instead of asserting any right under the Fifth Amendment, petitioner repeatedly waived his Fifth Amendment rights. During his initial interview, he freely confessed his own misconduct, a confession that was later determined to be a voluntary and intelligent waiver of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). During subsequent plea negotiations when his cooperation was once again sought, he never indicated that his refusal to give it was motivated by concern over self-incrimination. During the sentencing hearing following his guilty plea, petitioner's counsel ad-

dressed the question of his failure to cooperate but never suggested that it rested on Fifth Amendment grounds. Instead, he explained that petitioner's failure to provide information was due to his limited involvement in the heroin conspiracy.

As this Court repeatedly has held, the Fifth Amendment may not be relied on unless it is invoked in timely fashion. *Garner* v. *United States*, 424 U.S. 648, 655 (1976). In this case, as in *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113 (1927), petitioner "did not assert his privilege or in any manner suggest that he withheld his testimony because there was any ground for fear of self-incrimination. His assertion of it here is evidently an afterthought." The Court added in *Vajtauer* that "[t]he privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it." *Ibid.* This principle requires a convicted defendant who believes that his failure to cooperate is privileged on Fifth Amendment grounds to invoke the privilege before sentence is pronounced. "If [petitioner] had felt that he would be criminally implicated in any way by the information which he had at his disposal, but which he wished to share with authorities * * * he could have asserted his Fifth Amendment privilege before the [sentencing] Court." *United States* v. *Vermeulen*, 436 F.2d 72, 76-77 (2d Cir. 1970), cert. denied, 402 U.S. 911 (1971).

Nor was petitioner's refusal to cooperate shielded from the scrutiny of the sentencing court by *Miranda* v. *Arizona*, *supra*. Although *Miranda* enables a suspect subject to custodial interrogation to terminate questioning and prevents the prosecutor from subsequently using the suspect's silence during interrogation as evidence against him at trial, the safeguards of *Miranda* apply only in the context of custodial interrogation. "All *Miranda*'s safeguards, which are designed to avoid the coercive atmosphere, rest on the overbearing compulsion which the Court thought was caused by isolation of a suspect in police custody." *United States* v. *Washington*, 431 U.S. 181, 187 n.5 (1977). As the Court emphasized in *Miranda*, *supra*, 384 U.S. at 477-478, "general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."

In the present case, petitioner's failure to cooperate with authorities cannot be viewed as an effort to terminate questioning during custodial interrogation within the meaning of *Miranda*. Petitioner was never subjected to custodial interrogation. In addition, he refused to cooperate throughout the entire period between his first interview in 1975 and the imposition of sentence in 1978. He was fully apprised that his failure to cooperate would be made known and would affect his exposure to criminal penalties. This is thus not a case such as *Doyle* v. *Ohio*, 426 U.S. 610

(1976), in which the defendant may have been misled about the consequences of his refusal to divulge information. In sum, there is no warrant for extending the reasoning of *Miranda* to the circumstances involved in this case.

III.

There is no basis for disturbing petitioner's sentence under the "supervisory powers" doctrine. This Court has repeatedly disavowed any "supervisory" role with respect to sentences that are imposed within statutory limits and do not infringe any constitutional right. See *Dorszynski* v. *United States*, 418 U.S. 424, 440-441 (1974). " 'If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute.' " *Ibid.*

The sentencing court did not comport itself improperly in any way. At no time did the court "participate" in plea discussions contrary to Fed. R. Crim. P. 11(e)(1). Nor did the trial court improperly take sides with the prosecutor in considering petitioner's failure to cooperate. The trial court reviewed all of the evidence relevant to the exercise of its sentencing discretion, as presented both by defense counsel and the prosecutor. See Fed. R. Crim. P. 32(a)(1). The court did not attempt to bargain with petitioner, to coerce him into cooperating with the

prosecutor or to penalize the exercise of any constitutional right. Instead, it afforded retrospective consideration to all of the relevant facts—including petitioner's conviction for the serious crime of distributing heroin, his prior convictions for bank robbery, and his refusal to help the authorities deal with the grave problems to which his own illegal activities had contributed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONSIDERED PETITIONER'S REFUSAL TO COOPERATE WITH THE GOVERNMENT AS ONE RELEVANT FACTOR IN IMPOSING SENTENCE

Under the provision authorizing petitioner's sentence, 21 U.S.C. 843(c), Congress has vested the district court with broad sentencing discretion. At one extreme, the court may impose a sentence of probation. At the other, it is empowered to impose consecutive four year prison sentences and $30,000 fines based on each separate use of the telephone to distribute heroin. Moreover, under 18 U.S.C. 4205(b), the court may also impose a minimum sentence that must be served before the defendant can be considered for parole. That minimum sentence may be up to one-third of the statutory maximum (here, 16 months on

each count). See *United States* v. *Addonizio*, No. 78-156 (June 4, 1979), slip op. 10-11 n.15.[7]

The district court imposed a sentence in this case that was neither the maximum nor the minimum. The sentence approached the maximum, however, and was justified by reference to petitioner's prior convictions for serious offenses, including bank robbery, and petitioner's admitted role as a heroin dealer. The court also referred to the fact that petitioner failed to cooperate with the authorities despite repeated requests for cooperation. Consideration of petitioner's failure to cooperate, like his prior criminal record and his significant role in a large-scale heroin distribution scheme, was entirely proper.[8]

---

[7] As the House Committee noted, the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, which contains the provision under which petitioner was sentenced, gives "maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case." H.R. Rep. No. 91-1444 (Part 1), 91st Cong., 2d Sess. 11 (1970); see also *id.* at 8-9.

[8] There is no merit to the repeated assertion of amici American Civil Liberties Union and National Capital Area Civil Liberties Union that petitioner's failure to cooperate was "the controlling factor in the decision to impose maximum consecutive four year sentences" (Amici Br. 9, 19), or resulted in "a conclusive inference of poor rehabilitative prospects" (*id.* at 5). The trial judge listened to extensive allocutions which discussed all pertinent factors, noted that it had considered the case carefully, and recited several relevant considerations in pronouncing sentence (App. 40).

A. Petitioner's refusal to cooperate showed that he was unwilling to accept responsibility for the consequences of his actions, was a poor prospect for rehabilitation, and was likely to pose a continuing danger to the community

1. Analysis of the factors relevant in imposing sentence requires brief reference to the underlying purposes of criminal sentencing. There is general agreement that the purposes of criminal sentencing include the following: a) rehabilitation of offenders;[9] b) protection of society by confining offenders with antisocial tendencies;[10] c) retribution for and denunciation of antisocial conduct;[11] d) deterrence of others who might engage in such conduct;[12] and e)

---

[9] See *Williams* v. *New York*, 337 U.S. 241, 248-249 n.13 (1949); *United States* v. *Grayson*, 438 U.S. 41, 47-52 (1978); National Council on Crime and Delinquency, *Model Sentencing Act* § 1 (1972).

[10] *Williams* v. *New York, supra; United States* v. *Brown*, 381 U.S. 437, 458 (1965); ABA, *Minimum Standards For Criminal Justice: Sentencing Alternatives and Procedures* §§ 2.2, 2.5(c)(i), 3.4(b)(iv), at 14, 17, 24 (Approved Draft 1968).

[11] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 14 (1967); P. O'Donnell, M. Churgin, & D. Curtis, *Toward a Just and Effective Sentencing System* 48-49 (1977); H.L.A. Hart, *Punishment and Responsibility* 9 (1968).

[12] *Williams* v. *New York, supra; Model Penal Code* § 1.02(2) (Proposed Official Draft 1962); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts, supra*, at 14.

promotion of the efficient administration of justice.[13] Petitioner's failure to cooperate was a direct indication that a substantial period of imprisonment was required to vindicate these purposes.

Petitioner's failure to cooperate with authorities by naming the persons who provided him with heroin showed that he was unwilling to take steps to help mitigate the antisocial effects of his illegal activities. It is beyond dispute that heroin distribution contributes to the addiction of members of the community and spurs criminal actions by persons who become addicts. Petitioner admitted that he caused this injury to society, but he refused to take steps to help society ameliorate the injury. A convicted heroin dealer who refuses to make amends for his actions is a poor candidate for rehabilitation—"rehabilitation requires his recognition of community interests and of the obligations of community life." Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 437 (1958).

A substantial prison sentence was also required to protect the community. If petitioner had cooperated with authorities by identifying his suppliers, this would effectively have terminated his relationship with his criminal associates. But by refusing to help authorities apprehend such persons and put an end to their illegal activities, petitioner showed that he

[13] *Brady* v. *United States*, 397 U.S. 742, 752-753 (1970); *Corbitt* v. *New Jersey*, 439 U.S. 212, 220-224 (1978); R. Dawson, *Sentencing: The Decision as to Type, Length and Conditions of Sentence* 173-192 (1969).

was unwilling to sever his prior relations. The sentencing court could fairly conclude that someone so disposed would be in a position to return to the criminal conspiracy upon release from prison, a consideration demanding a substantial period of incarceration to protect the public.

Petitioner's failure to cooperate with authorities after admitting his involvement in a heroin distribution conspiracy demanded a stern response to promote respect for the law and to underscore the seriousness of his offense. Offenders who repeatedly engage in serious crimes and who give every appearance of continuing to be at "war" with society (*Williams* v. *New York*, *supra*; *United States* v. *Grayson*, 438 U.S. 41, 51 (1978)), are deserving of substantial punishment to exemplify the gravity of their misconduct.

Finally, failure to cooperate with the authorities shows an unwillingness to pay the price that society demands in return for sentence concessions. Although petitioner provided some cooperation by admitting his own misconduct, he refused to identify other persons who continued to participate in the criminal venture. Petitioner was thus unwilling to establish his entitlement to leniency by extending a reciprocal benefit to the state. *Brady* v. *United States*, *supra*, 397 U.S. at 753.

Although petitioner and amici contend (Br. 11-12, 17-18; Amici Br. 6-20) that petitioner's failure to cooperate was motivated by a desire to avoid retaliation or self-incrimination, the record directly refutes

such arguments. (We address petitioner's self-incrimination arguments in detail at pages 34-49, *infra*.) Petitioner was notified during his first interview in 1975 that the extent of his cooperation would be made known to the court and would determine the charge against him (App. 35-36). He never suggested, however, that he was refusing to cooperate due to fear of retaliation or of self-incrimination. His only explanation for refusing to name his suppliers, as stated by his attorney during allocution, was that he "wasn't that involved" in the heroin distribution conspiracy (App. 30).[14] Moreover, after the prosecutor described petitioner's refusal to cooperate to the sentencing judge, petitioner and his counsel offered no further explanation for the refusal, contending instead that the government's sentencing recommendation should be disregarded because the government was "mad at Mr. Roberts" (App. 39). Under these circumstances, the sentencing court properly considered petitioner's failure to cooperate as reflecting a refusal to disavow his prior criminal allegiances. Petitioner presented no information to the prosecutor or the sentencing judge that would suggest that his non-cooperation had any other basis.

2. The district court's consideration of petitioner's failure to cooperate—together with his disingenuous explanation for non-cooperation—was entirely consist-

[14] That explanation was implausible (Oct. 17, 1975 Tr. 12). Petitioner was the middleman in the distribution process (App. 36) and played a central role in the illegal scheme (*id.* at 15-17).

ent with the congressional directive that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence * * *" (21 U.S.C. 850; see also 18 U.S.C. 3577). This Court has also emphasized that the sentencing judge may consider all available information bearing on the "convicted person's past life, * * * habits, conduct, and mental and moral propensities." *Williams* v. *New York*, *supra*, 337 U.S. at 245. The Court explained in *Williams* that the sentencing court must have "the fullest information possible concerning the defendant's life and characteristics" (*id.* at 247)—information extending to "every aspect of a defendant's life" (*id.* at 250).

These considerations were recently reiterated by the Court in *United States* v. *Grayson*, *supra*, which held that the sentencing court may take into account the defendant's commission of perjury during the course of trial. The Court explained that such actions are "probative of his attitudes toward society and prospects for rehabilitation" (438 U.S. at 50). Even though a defendant is subject to strong pressures to commit perjury in his own defense, the Court concluded that such conduct is a proper basis for imposing punishment because the " 'universal and persistent' foundation stone in our system of law, and particularly in our approach to punishment, sentencing, and incarceration, is the 'belief in freedom of the human will and a consequent ability and

duty of the normal individual to choose between good and evil.'" *Id.* at 52. In selecting an appropriate sentence, the Court emphasized, it is necessary "to consider the defendant's whole person and personality * * *. The 'parlous' effort to appraise 'character' * * * degenerates into a game of chance to the extent that a sentencing judge is deprived of relevant information concerning 'every aspect of a defendant's life'" (*id.* at 53).

These principles have been repeated throughout the opinions of this Court discussing the sentencing discretion of trial judges. See, *e.g.*, *Pennsylvania* v. *Ashe*, 302 U.S. 51, 55 (1937) ("[J]ustice generally requires * * * that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him."). See also *United States* v. *Tucker*, 404 U.S. 443, 446 (1972) ("[A] trial judge in the federal judicial system generally has wide discretion in determining what sentence to impose. * * * [B]efore making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.").

Consistent with these principles, the lower courts have frequently approved the practice of considering the extent of the defendant's cooperation prior to imposing sentence. See, *e.g.*, *United States* v. *Barnes*, 604 F.2d 121, 153-154 (2d Cir. 1979), petition for

cert. pending, No. 79-261 (sentencing court may consider non-cooperation along with other relevant factors); *United States* v. *Miller*, 589 F.2d 1117, 1137-1139 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979), ("Consideration of failure to cooperate with authorities is certainly germane to an evaluation of a defendant's attitude toward society"); *United States* v. *Hendrix*, 505 F.2d 1233, 1236 (2d Cir. 1974), cert. denied, 423 U.S. 897 (1975); *United States* v. *Hayward*, 471 F.2d 388, 390-391 (7th Cir. 1972); *United States* v. *Chaidez-Castro*, 430 F.2d 766, 770-771 (7th Cir. 1970); *United States* v. *Vermeulen*, 436 F.2d 72, 75-77 (2d Cir. 1970), cert. denied, 402 U.S. 911 (1971). See also *United States* v. *Richardson*, 582 F.2d 968, 969 (5th Cir. 1978). The importance of a defendant's cooperation or non-cooperation in determining an appropriate sentence has also been recognized in sentencing institutes and scholarly studies. See, *e.g.*, ABA, *Minimum Standards for Criminal Justice: Pleas of Guilty* § 1.8 (a)(v) (see also commentary at pages 48-49) (Approved Draft 1968); R. Dawson, *Sentencing: The Decision as to Type, Length, and Conditions of Sentence* 177-178 (1969); D. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* 186-187 (1966). These authorities confirm the propriety of the district court's consideration of the extent of petitioner's cooperation in imposing sentence in the present case.[15]

---

[15] See also Lumbard, *Sentencing and Law Enforcement*, 40 F.R.D. 406, 413 (1967); Bennett, *Individualizing the Sen-*

B. A convicted defendant's failure to cooperate with authorities is a relevant aggravating factor, just as his affirmative cooperation would be a relevant mitigating factor

Both petitioner and amici agree (Br. 14, 17; Amici Br. 19 n.8) that the extent of a convicted defendant's cooperation is relevant in granting leniency. They insist, however, that lack of cooperation may not be considered as a basis for enhancing a sentence.[16]

---

tencing Function, 27 F.R.D. 359, 364 (1961); Herlands, *When and How Should a Sentencing Judge Use Probation*, 35 F.R.D. 487, 496 (1964). The degree of the convicted defendant's cooperation with the authorities is customarily evaluated in his presentence report. See Administrative Office of the United States Courts, Division of Probation, *The Presentence Investigation Report* 8 (1978); see also *id.* at 15. Cooperation with authorities is also considered to be a valid sentencing criterion in English courts. See R. Cross, *The English Sentencing System* 154-156 (1971). As this Court noted in *Branzburg* v. *Hayes*, 408 U.S. 665, 696 (1972), there is little to recommend the concealment of information needed to uncover criminal activity. The Court observed that "historically, the common law recognized a duty to raise the 'hue and cry' and report felonies to authorities." *Ibid.* (footnote omitted).

[16] Some lower court opinions have expressed the view that cooperation is a relevant mitigating factor, while noncooperation is irrelevant. See *DiGiovanni* v. *United States*, 596 F.2d 74, 75 (2d Cir. 1979); *United States* v. *Ramos*, 572 F.2d 360, 363 n.2 (2d Cir. 1978) (concurring opinion). The Second Circuit's latest decision on this question, *United States* v. *Barnes*, *supra*, 604 F.2d at 154, expressly rejects this distinction ("In imposing sentence the court may consider a defendant's cooperation or lack thereof as long as *all* factors are considered. * * * Thus, reference to a lack of cooperation as a factor does not render a sentence subject to resentencing because of any infirmity therein.").

1. As Judge MacKinnon pointed out in his separate statement in the court below (Pet. App. 21a), the present record affords no basis for concluding that "an enhanced sentence" was imposed on petitioner due to his failure to cooperate. As noted on pages 7-9, *supra*, the prosecutor's discussion of the extent of petitioner's cooperation was offered in response to the allocution of petitioner's counsel. Counsel asserted that petitioner had willingly implicated himself and that he failed to implicate others only because of his limited involvement in the conspiracy. Counsel ended his allocution by asking the trial court to impose a probationary sentence. The prosecutor responded by pointing out that petitioner had "stonewalled" the government by failing to provide information accessible to him. He argued that petitioner's limited cooperation should not therefore be viewed as an "extenuating" or "mitigating" circumstance (App. 36). The prosecutor at no time stated that he sought "additional" punishment based on petitioner's failure to cooperate.

Moreover, as Judge MacKinnon observed, the sentence imposed on petitioner was not a severe one when his conduct and prior criminal record are considered (Pet. App. 21a). Petitioner had previously been convicted on ten counts of bank robbery and was on parole from his sentence for those offenses at the time of his present offenses (App. 17).[17] He also

---

[17] The record does not indicate how many separate bank robberies underlay those convictions.

had been convicted of petit larceny and had been arrested for drunkenness, disorderly conduct, and housebreaking (App. 43). His role in the crimes charged in the present indictment was that of a major narcotics distributer engaged in a highly lucrative business, not a mere drug user. These facts, standing by themselves, fully justified petitioner's two to eight year sentence,[18] which, in fact, was substantially less than the original sentence imposed after his first guilty plea (4-15 years' imprisonment)—a sentence imposed by the court without reference to the issue of cooperation. Finally, nothing in the district court's explanation of its two to eight year sentence suggests that it was imposing "additional" punishment on petitioner for failing to cooperate. Rather, the court simply enumerated the relevant factors that it took into account in reaching its decision—petitioner's prior criminal record, the seriousness of his offenses, and his unwillingness to cooperate (App. 40).

2. In addition, we see no meaningful distinction between "enhancing" punishment for non-cooperation (which petitioner and amici oppose) and denying "leniency" to those who fail to cooperate (which petitioner and amici apparently would countenance).[19]

---

[18] The district court declined to fine petitioner or impose maximum prison time before parole eligibility.

[19] On the facts of this case, it is not possible to speak meaningfully of imposing "additional punishment." There is no normative sentence that persons in petitioner's position could

Under petitioner's proposed sentencing scheme, the sentencing court would grant leniency to those who cooperate while denying that benefit to those who do not. This would effectively create two levels of punishment premised on the extent of a defendant's cooperation.[20] Cooperation would be the occasion for a relatively light sentence, and non-cooperation the occasion for a more severe sentence. All of the pressures that petitioner and amici complain of (Br. 10-13; Amici Br. 26-27, 36-37) would be present in a system in which "leniency" is granted to those who cooperate but denied to those who do not. Persons wishing to avoid longer sentences would inevitably be subjected to pressure to cooperate with the authorities, regardless of whether the disincentive is char-

---

expect to receive apart from the question of cooperation or non-cooperation. The trial judge has a broad range of sentencing options ranging from probation to consecutive 16-48 month sentences with $30,000 fines on each count of the indictment. The appropriate point on this spectrum is determined by considering all relevant factors. The fact that consecutive sentences are not ordinarily imposed in the District of Columbia based on multiple uses of the telephone to distribute heroin does not limit the district court's discretion. Congress has provided that each such use is a separate offense, carrying a separate penalty. When the defendant's conduct and prior criminal record strongly suggest the likelihood of future misconduct, the full range of sentencing options is properly considered. See *Pennsylvania* v. *Ashe*, *supra*, 302 U.S. at 54-55: "Persistence in crime and failure of earlier discipline effectively to deter or reform justify more drastic treatment."

[20] The term "leniency" would have no meaning if there were no difference between sentences imposed on those who cooperate and those who do not cooperate.

acterized as "denying leniency" or "imposing additional punishment." As Judge MacKinnon pointed out, these characterizations are simply "two sides of the same coin" (Pet. App. 23a).

We also submit that it would be perfectly proper for a district court, in imposing sentence, explicitly to predicate "additional punishment" on a defendant's failure to cooperate (something that the court did not do in the present case). For example, if a sentencing judge were separately to determine the sentence that would be appropriate in light of all relevant factors apart from non-cooperation, and were then to add to that sentence an additional year's imprisonment based solely on non-cooperation, his disposition would be permissible if the sentence remained within statutory limits. As we have noted, the decisions of this Court establish that trial courts possess broad discretion to impose sentences within statutory limits and may consider the entire range of factors bearing on a convicted defendant's character, amenability to reform, and attitude toward society. There is no logical reason why those factors should be pertinent only when considering the possibility of affording "leniency" to a convicted defendant.[21]

Consideration of a defendant's failure to cooperate —even as an aggravating factor—presents no question of unfairness so long as the defendant has an opportunity to cooperate and has a chance to explain

[21] As discussed on pages 49-50, *infra*, this Court repeatedly has held that sentences imposed within statutory limits are not subject to review on grounds of undue severity.

why his non-cooperation should not be penalized. In the present case, petitioner was advised from the outset that the extent of his cooperation would be made known and would affect his punishment. Plea negotiations focused on his cooperation. He also had the opportunity to explain to the prosecutor and sentencing judge why his non-cooperation should not be considered.[22] If petitioner believed that his cooperation could result in retaliation by others he should have explained this to the prosecutor and the judge so that the basis for his concern could be examined and steps taken to protect him. See *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961) (the government can protect witnesses from retaliation); see also Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title V, 84 Stat. 933-934 (government witness protection program). Perhaps the court would

[22] See generally Fed. R. Crim. P. 32(a)(1) (the defendant and his attorney may "present any information in mitigation of punishment" before sentence is pronounced); ABA, *Minimum Standards for Criminal Justice: Sentencing Alternatives and Procedures* § 5.3 (Approved Draft 1968). Contrary to the suggestion of amici (Amici Br. 2, 6-19), the sentence in this case did not rest on "false" information or "arbitrary" considerations. Petitioner and his counsel had the opportunity to explain petitioner's reasons for failing to identify his suppliers. The reason actually proffered—minimal involvement in the conspiracy—was implausible. In this Court, petitioner offers little more by way of explanation. He asserts, without citation of authority, that "[i]n remaining silent about his confederates petitioner was not called upon to detail his reasons for doing so; indeed, that judicial inquiry would itself have been improper" (Br. 11-12)—a singular argument for a convicted heroin dealer with an extensive prior criminal record who appealed to the district court for probation.

have been influenced in its sentencing decision by such an explanation. But in its absence, and in face of petitioner's unpersuasive explanation for refusing to cooperate, the district court had no ground for concluding that petitioner's refusal to cooperate had a justifiable basis.

II. PETITIONER'S REFUSAL TO COOPERATE WITH THE AUTHORITIES WAS NOT AN EXERCISE OF FIFTH AMENDMENT RIGHTS

Petitioner contends (Br. 8-13) that the district court's consideration of his failure to cooperate as one relevant factor in imposing sentence resulted in his being "punished * * * for exercising his Fifth Amendment right against self-incrimination." (See also Amici Br. 21-30.)

However, the record in this case establishes that petitioner was not punished for exercising any constitutional right. In fact, petitioner willingly disclosed his own illegal activities during his initial interview with the United States Attorney. This self-incrimination was subsequently found to be a knowing, voluntary, and intelligent waiver of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). See App. 16 n.4. It was only when petitioner was asked for information about the identity of other conspirators that he stated that he would not provide such information, explaining (in the words of his attorney) that he "wasn't that involved in it" (App. 30). Petitioner was repeatedly informed that the extent of his cooperation would be made known and would affect the disposition of his case (App. 16, 30, 35). At no time did he suggest that his refusal to incriminate *other* persons resulted from a fear of self-incrimination.

During the ensuing plea bargaining process, petitioner's cooperation was again solicited and denied (Jan. 28, 1977 Tr. 17). Neither petitioner nor his counsel suggested that his refusal to cooperate was predicated on an exercise of constitutional rights. At no time was immunity from prosecution for "other crimes" sought by petitioner or his counsel.

Petitioner subsequently pleaded guilty, first to the conspiracy count and then, after a successful appeal from his conviction, to two of the substantive counts contained in the indictment. During the ensuing sentencing hearing, defense counsel discussed the extent of petitioner's cooperation; he did not contend that petitioner's refusal to cooperate was an impermissible sentencing consideration, nor did he indicate that it rested on an exercise of Fifth Amendment rights.

Only on appeal from his conviction did petitioner argue, for the first time, that it was not proper to consider his non-cooperation because this would be equivalent to penalizing his exercise of Fifth Amendment rights (Ct. App. Br. 16).[23]

---

[23] The government pointed out in its brief in the court of appeals that petitioner's Fifth Amendment argument was an afterthought raised for the first time on appeal and that the Fifth Amendment would not in any event privilege a refusal to incriminate other persons (Ct. App. Br. 23 n.11). The court of appeals affirmed petitioner's conviction without opinion (Pet. App. 1a-2a).

A. Petitioner Failed To Invoke The Fifth Amendment

At no time during the three-year period following petitioner's first interview and preceding the imposition of his sentence did petitioner invoke the Fifth Amendment privilege against compelled self-incrimination as a basis for withholding information from the prosecutor. To the contrary, his actions confirmed that he did not intend to exercise the privilege. He knowingly waived his *Miranda* rights and incriminated himself. His only reluctance pertained to incriminating other persons—a form of incrimination that is not shielded by the Fifth Amendment. See, *e.g.*, *Rogers* v. *United States*, 340 U.S. 367, 370-375 (1951); *United States* v. *Mandujano*, 425 U.S. 564, 572 (1976). Following petitioner's guilty plea (a waiver of Fifth Amendment rights as to the charges subject to the plea; see *Boykin* v. *Alabama*, 395 U.S. 238, 242-243 (1969); *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969); *Brady* v. *United States*, 397 U.S. 742, 748 (1970)), the remaining conspiracy count and substantive counts against petitioner were dismissed.[24] During the sentencing hearing, petitioner's attorney fully disclosed petitioner's failure to cooperate with the government. He never suggested that the sentencing judge should disregard the extent of petitioner's cooperation and never attempted to invoke the Fifth Amendment.

---

[24] Petitioner was not subject to reprosecution on the dismissed counts. See, *e.g.*, *United States* v. *Stricklin*, 591 F.2d 1112, 1123 n.3 (5th Cir. 1979), cert. denied, No. 79-307 (Nov. 26, 1979).

The Fifth Amendment provides effective protection against compelled self-incrimination. *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979). An exercise of Fifth Amendment rights, when properly invoked, cannot be penalized. *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968). The privilege does not apply, however, unless it is timely exercised. This principle is illustrated by the case of *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103 (1927), in which an alien subject to deportation proceedings refused to provide information that arguably tended to show his involvement in illegal subversive activities. He contended on appeal that his refusal to provide that information was privileged under the Fifth Amendment. This Court rejected that contention in words that are directly applicable here (*id.* at 112-113):

> Assuming that the constitutional immunity against self-incrimination may be violated as well by inferences drawn from silence with respect to incriminating matters as by testimony which the witness is compelled to give, still it is necessary to inquire whether the appellant here has brought himself within the protection of the immunity.
>
> Throughout the proceedings before the immigration authorities, he did not assert his privilege or in any manner suggest that he withheld his testimony because there was any ground for fear of self-incrimination. His assertion of it here is evidently an afterthought. It is for the tribunal conducting the trial to determine what weight should be given to the contention of the

> witness that the answer sought will incriminate him, * * * a determination which it cannot make if not advised of the contention. * * * The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it.

As the Court reaffirmed in *Garner* v. *United States*, 424 U.S. 648, 655 (1976), a timely exercise of Fifth Amendment rights is a necessary prerequisite to any claim of privilege:

> Unless a witness objects, [the] government ordinarily may assume that its compulsory processes are not eliciting testimony that he deems to be incriminating. Only the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege.

The Court added that "the claim of privilege ordinarily must be presented to a 'tribunal' for evaluation at the time disclosures are initially sought." *Id.* at 658 n.11. This Court has restated that basic principle on many occasions. See, *e.g.*, *United States* v. *Mandujano*, *supra*, 425 U.S. at 574-575; *Maness* v. *Meyers*, 419 U.S. 449, 466 (1975); *United States* v. *Kordel*, 397 U.S. 1, 7-10 (1970); *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 107 (1961); *Rogers* v. *United States*, *supra*, 340 U.S. at 370-375.

Consistent with this principle, a convicted defendant who refuses cooperation in order to avoid a risk

of self-incrimination must disclose this basis for his action and invoke the privilege before sentence is imposed in order to preserve any Fifth Amendment claim. See *United States* v. *Vermeulen*, *supra*, 436 F.2d at 76-77:

> The gravamen of appellant's contention is that by remaining silent, his failure to cooperate with any public official * * * led to a harsher sentence which imposed an unconstitutionally "costly" penalty for the exercise of his rights under the Fifth Amendment. * * *
>
> If appellant had felt that he would be criminally implicated in any way by the information which he had at his disposal, but which he wished to share with authorities for his own benefit by "singing," he could have asserted his Fifth Amendment privilege before the Court. This would have put the Government and the Court on notice so that the situation might have been altered by a grant of immunity from future criminal prosecution. The possibility of immunity was never suggested, however, and the Fifth Amendment privilege was never raised below.

If petitioner had timely invoked the Fifth Amendment prior to the imposition of sentence and explained that he was prepared to name his co-conspirators but for the possibility of self-incrimination with respect to other crimes, the sentencing court could have determined if there was any basis for invoking the Fifth Amendment. See *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951) ("[H]is say-so does not itself establish the hazard of incrimination. It is

for the court to say whether his silence is justified * * *."); *Rogers* v. *United States*, *supra*, 340 U.S. at 374-375; *Mason* v. *United States*, 244 U.S. 362, 364-367 (1917).

Moreover, if petitioner had indicated a willingness to cooperate but raised a Fifth Amendment privilege claim, the prosecutor could have considered the advisability of obtaining immunity to displace the asserted privilege (see 18 U.S.C. 6002) or considered entering into a binding plea agreement that would protect petitioner from prosecution for other crimes (see *Santobello* v. *New York*, 404 U.S. 257, 262 (1971)). Petitioner's failure to invoke the privilege frustrated this procedure. See *United States* v. *Mandujano*, *supra*, 425 U.S. at 575; see also *Garner* v. *United States*, *supra*, 424 U.S. at 658 n.11 ("[E]arly evaluation of claims allows the Government to compel evidence if the claim is invalid or if immunity is granted and therefore assures that the Government obtains all the information to which it is entitled.").[25]

---

[25] Where, as here, the potential witness does not claim the privilege but simply "stonewalls" the government, the prosecutor has no basis for deciding whether to confer immunity. When the defendant refuses to cooperate by supplying information unknown to the prosecutor, a grant of immunity and compulsion to testify ordinarily will prove unproductive. The non-cooperating witness usually can commit perjury with relatively little risk of prosecution. In a case such as this, in which the prosecutor has no independent information about the identity of a heroin supplier, the defendant is free to provide false information (*e.g.*, "I got the heroin from a man in the park named John; I never knew his last name."). Thus, as a practical matter, an invocation of the Fifth Amendment—which explains the defendant's refusal to cooperate and shows that he is not simply "stonewalling" the government—is essential if immunity is to be seriously considered. See *United States* v. *Mandujano*, *supra*, 425 U.S. at 575. In light of petitioner's adamant refusal to cooperate in the present case, without any suggestion that his non-cooperation stemmed from a fear of self-incrimination, it was entirely reasonable for the prosecutor to give no consideration to use of the immunity statute to displace the protection afforded by the Fifth Amendment. Immunity from prosecution is not lightly conferred on persons believed to be law violators. Immunity is not considered absent a reasonable assurance of reciprocal benefits from the suspect.

In sum, by failing to make a timely invocation of the Fifth Amendment, petitioner prevented the district court from evaluating his claim to determine whether or not it was a "subterfuge" (*United States* v. *Mandujano*, *supra*, 425 U.S. at 575) used "for the real purpose of securing immunity to some third person, who is interested in concealing the facts" (*Brown* v. *Walker*, 161 U.S. 591, 600 (1896)). His failure to invoke the Fifth Amendment also prevented the prosecutor from considering the advisability of obtaining immunity to displace the privilege. Moreover, because the district court was not alerted to the possibility that petitioner believed that his non-cooperation might have been privileged under the Fifth Amendment—indeed, was invited to consider the extent of petitioner's cooperation by the allocution of defense counsel—the court had no occasion to exclude it from its evaluation. In these circumstances, petitioner's Fifth Amendment arguments are properly dismissed as a mere "afterthought."

Vajtauer v. *Commissioner of Immigration, supra,* 273 U.S. at 113.[26]

B. Petitioner's Non-Cooperation Was Not Privileged Under *Miranda* v. *Arizona*

Petitioner also contends—in an argument raised neither in the district court nor the court of appeals—that his non-cooperation was privileged under *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and should not therefore have been taken into account at the time of sentencing (Br. 8-10; see also Amici Br. 16 n.7, 25).[27] *Miranda* offers no support, however, to petitioner's contentions.

1. *Miranda* held that persons interrogated while in police custody must be warned that they have the right to remain silent, that statements made during interrogation can be used against them, and that

[26] The court of appeals' opinions holding on Fifth Amendment grounds that it is improper to take into account a convicted defendant's non-cooperation in imposing sentence do not consider or decide the question which is dispositive here—petitioner's failure to make a timely assertion of Fifth Amendment rights. See *United States* v. *Rogers,* 504 F.2d 1079 (5th Cir. 1974); *United States* v. *Garcia,* 544 F.2d 681 (3d Cir. 1976). The general arguments of petitioner and amici about "penalizing" the exercise of constitutional rights may have relevance to "third parties in hypothetical situations" (*County Court of Ulster County* v. *Allen,* No. 77-1554 (June 4, 1979), slip op. 13), but they have no bearing on the facts presented in this case.

[27] Absent exceptional circumstances, this Court does not review arguments that have not been raised in the lower courts. See, *e.g., United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977).

they have the right to the presence of an attorney (who will be appointed if they cannot afford to retain an attorney). 384 U.S. at 479. If the interrogated party indicates "at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege." *Id.* at 474 (footnote omitted).[28]

The rules prescribed in *Miranda* are rules of special application to the inherently coercive situation of "custodial interrogation." *Miranda* does not purport to alter the ordinary principles of Fifth Amendment law, summarized above, that apply outside the context of custodial interrogation. See *Garner* v. *United States, supra,* 424 U.S. at 657-658; *United States* v. *Mandujano, supra,* 425 U.S. at 578-584; *Beckwith* v. *United States,* 425 U.S. 341, 345-348 (1976); *Oregon* v. *Mathiason,* 429 U.S. 492, 495-496 (1977). See also *United States* v. *Washington,* 431 U.S. 181, 187 n.5 (1977) ("All *Miranda*'s safeguards, which are designed to avoid the coercive atmosphere, rest on the overbearing compulsion which the Court thought was caused by isolation of a suspect in police custody.").

Petitioner's continuous course of non-cooperation with the authorities cannot be viewed as an attempt to terminate questioning during custodial interro-

[28] These procedural safeguards "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Michigan* v. *Tucker,* 417 U.S. 433, 444 (1974).

gation. At the time when he was first interviewed and his cooperation was solicited, petitioner had come voluntarily to the office of the United States Attorney to accompany his girlfriend. He was not under arrest and his freedom was not impaired (Oct. 17, 1975 Tr. 7-12, 27-40; App. 16-17, 29-30, 35-36).[29] See *Oregon* v. *Mathiason*, *supra*, 429 U.S. at 495 ("[T]here is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a ½ hour interview respondent did in fact leave the police station without hindrance."). Following his indictment and arrest several weeks later, the government negotiated with petitioner's counsel, seeking petitioner's cooperation in identifying his heroin supplier (Jan. 28, 1977 Tr. 17). Petitioner continued to refuse to cooperate up to his sentencing hearing (App. 30, 39).

In sum, the refusal to cooperate with authorities involved in this case cannot be analogized to a failure to answer questions during custodial interrogation without benefit of counsel; rather, petitioner manifested a consistent unwillingness to cooperate during the entire period between the first interview in 1975

[29] While *Miranda* warnings must precede custodial interrogation, the warnings may be and often are administered, from an abundance of caution, even though the recipient of the warnings is not in custody. Thus, the fact that petitioner was warned does not show that he was subjected to custodial interrogation.

and the time of his sentencing in 1978, during much of which he was not in custody and was represented by counsel (App. 36). The *Miranda* rules, which privilege a suspect's silence during custodial interrogation, have no application to these facts. As the Court explained in *Miranda*:

> [G]eneral questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

384 U.S. at 477-478 (footnote omitted). Even for persons in custody who have affirmatively invoked their rights, *Miranda* cannot "sensibly be read to create a *per se* proscription of indefinite duration" (*Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975)); a fortiori, no permanent right of privileged silence exists for persons such as petitioner who are not subjected to custodial interrogation and who have not affirmatively asserted the rights described in *Miranda*.

There is, moreover, no possibility here that petitioner was "misled" by the prosecutor's *Miranda* warnings, which were given at the outset of his original interview.[30] Petitioner was notified during

[30] Even though petitioner was not subject to custodial interrogation or arrest, the United States Attorney gave him *Miranda* warnings as an additional safeguard at the com-

that interview that the extent of his cooperation would be determinative of the charges brought against him and would be made known to the court by the prosecutor (App. 16, 29-30, 35-36). Subsequent plea negotiations focused on the effort to secure his cooperation, and the subject was addressed in the government's presentence memorandum (App. 16-17). Under these circumstances, petitioner could not have entertained the belief that his refusal to cooperate was "privileged" or that the government did not intend to allocute based on his non-cooperation. There is thus no inherent "unfairness" here of the kind that may result when a suspect is led to believe that his silence during custodial interrogation will not be used against him, but the silence is nonetheless adduced as incriminating evidence at trial. See *Doyle* v. *Ohio*, 426 U.S. 610, 618 (1976).

2. Rather than occurring during custodial interrogation, petitioner's refusal to cooperate was manifested throughout a continuous process of plea negotiation. From the beginning, he was invited to enter into an agreement with the government that would involve his identification of his heroin supplier. This negotiation continued after petitioner was indicted and had retained counsel. As a result of these negotiations, petitioner decided to waive his own Fifth Amendment rights by pleading guilty. The pressures and inducements that led petitioner to waive his own

---

mencement of the interview (App. 16 & n.4). The United States Attorney also urged petitioner to consult with a lawyer to discuss the advisability of cooperating with the government (Oct. 17, 1975 Tr. 10-11, 31).

Fifth Amendment rights were entirely proper. See, *e.g.*, *Corbitt* v. *New Jersey*, 439 U.S. 212, 218-224 (1978); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363-365 (1978); *Brady* v. *United States*, 397 U.S. 742, 752-753 (1970).[31] If the government could properly bargain with petitioner to incriminate himself, it could certainly do so to obtain incriminating information about *others*. See ABA, *Minimum Standards for Criminal Justice: Pleas of Guilty*, *supra*, at § 1.8(a)(v). Petitioner had ample opportunity to consult with counsel, to explain to the prosecutor any reasonable fear of additional incrimination or for his safety, and to request immunity from prosecution for "other crimes" or protection from retaliation as part of his bargain. Nothing in *Miranda* suggests that it is improper for the prosecutor to bargain for cooperation or to advise the sentencing court of the convicted defendant's refusal to cooperate by providing information about his accomplices.

3. In any event, we note that the major premise of petitioner's argument (Br. 8-9, 18; see also Amici Br. 21-30)—that his "silence" was penalized—is without factual basis. Petitioner was anything but "silent." During his first interview, he disclosed his own illegal activities.[32] Rather than remaining silent

---

[31] There is no doubt that requests for cooperation from prosecutors place pressure on defendants to make disclosures contrary to their wishes. But the criminal justice system is replete with "hard choices," some of which involve waivers of Fifth Amendment rights. See *Corbitt* v. *New Jersey*, *supra*.

[32] As noted above, this confession was later found to be a voluntary waiver of his *Miranda* rights. See *North Carolina* v. *Butler*, No. 78-354 (Apr. 24, 1979).

about his co-conspirators, he evasively stated that he could not furnish the requested information because he was not "that involved" in the conspiracy (App. 30; see also Oct. 17, 1975 Tr. 12, 33). This disingenuous explanation, repeated during allocution, could properly be considered in imposing sentence.

Petitioner's express waiver of his own Fifth Amendment rights, coupled with an implausible explanation for refusing to provide information about other persons, cannot logically be viewed as an invocation of any constitutional right to refrain from self-incrimination. See *United States* v. *Goldman*, 563 F.2d 501, 503-504 (1st Cir. 1977), cert. denied, 434 U.S. 1067 (1978) ("After hearing the *Miranda* warnings * * * he answered most of the agent's questions * * *. We can find no passage in the record, however, where Goldman did indicate that he wished to reassert his right to remain silent."); *United States* v. *Joyner*, 539 F.2d 1162, 1165 (8th Cir.), cert. denied, 429 U.S. 983 (1976) ("Joyner was apprised of his *Miranda* rights and responded that he understood them. With that knowledge he chose to answer questions. * * * His statement that he would not reveal the exact location of the [stolen] truck was a direct answer freely given, not an ambiguous assertion of his right to remain silent."); *United States* v. *Agee*, 597 F.2d 350, 354-356 (3d Cir.) (en banc), cert. denied, No. 78-6482 (June 18, 1979). See also *Fare* v. *Michael C.*, No. 78-334 (June 20, 1979), slip op. 19-20 ("at some points he did state that * * * he could not, or would not, answer the question, but

these statements were not assertions of his right to remain silent").

Finally, petitioner's counsel, far from relying on a right of silence, expressly directed the sentencing court's attention to the subject of petitioner's cooperation, his admission of his own culpability, and his refusal to incriminate others due to his purported limited role in the conspiracy (App. 29-30). At no time did counsel object to the consideration of this subject during the sentencing hearing (see *Michigan* v. *Mosley*, *supra*, 423 U.S. at 100), or otherwise suggest that petitioner's Fifth Amendment rights were implicated or threatened by the proceedings.

In sum, the facts involved in *Miranda* are far removed from those presented here. The holding and reasoning of that case have no application to present circumstances.

III. PETITIONER'S SENTENCE, IMPOSED WITHIN STATUTORY LIMITS AND WITHOUT INFRINGEMENT OF HIS CONSTITUTIONAL RIGHTS, IS NOT SUBJECT TO APPELLATE REVIEW ON A "SUPERVISORY" BASIS

Amici argue (Amici Br. 31-37) that petitioner's sentence should be vacated pursuant to the "supervisory powers" of this Court, even if the sentence does not infringe his constitutional rights.

This Court repeatedly has disavowed any such "supervisory" role in reviewing criminal sentences imposed within statutory limits. As the Court noted in *Dorszynski* v. *United States*, 418 U.S. 424, 440-441 (1974), quoting *Gurera* v. *United States*, 40 F.2d 338, 340-341 (8th Cir. 1930): "If there is one rule

in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." This rule applies when substantial consecutive sentences are imposed. See *Gore* v. *United States*, 357 U.S. 386, 393 (1958); *Blockburger* v. *United States*, 284 U.S. 299, 305 (1932).

The Court has not hesitated, of course, to vacate sentences imposed in a manner that violates the convicted defendant's constitutional rights. For example, in *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948), the Court set aside a sentence that was based on information "extensively and materially false, which the prisoner had no opportunity to correct * * *." See also *United States* v. *Tucker*, *supra*, 404 U.S. at 446-449 (prior convictions obtained in violation of the right to counsel cannot be considered in determining sentence).[33] In the present case, however, the extent of petitioner's cooperation with the government was not in dispute. The facts were brought to the attention of the sentencing court by defense counsel. If counsel wished to add any further information in mitigation, he was perfectly free to do so. He elected, however, not to proffer any information—beyond the evasive explanation previously discussed—about petitioner's reasons for not cooperating.[34]

---

[33] We also assume that a sentence based on invidious criteria such as race, religion, or indigency would be subject to appellate review. See *Williams* v. *Illinois*, 399 U.S. 235 (1970). This case raises no such issue.

[34] As noted above, petitioner argues in this Court that any inquiry into his reasons for not cooperating would have been "improper" (Br. 11-12).

Amici also argue that petitioner's sentence should be set aside on a supervisory basis because the district court participated impermissibly in the plea bargaining process (Amici Br. 32-33). However, they cite nothing in the record that suggests that the district court "participated" in plea bargaining discussions in violation of Fed. R. Crim. P. 11(e)(1). Instead, they contend that the district court's consideration of "non-cooperation" as an aggravating factor "distorted" the plea bargaining process by reducing the number of petitioner's "bargaining chips." However, the trial court did not take away any of petitioner's "bargaining chips." He had almost none to begin with. He confessed his illegal activities as a heroin dealer from the outset. The prosecutor possessed tape recordings of the telephone calls in which petitioner made the heroin sale arrangements (App. 15-16). Petitioner flatly refused to cooperate with the government; he did not seek to obtain immunity from prosecution with respect to other crimes or request police protection against possible attempts to "retaliate" against him. His prior criminal record showed unmistakably that he posed a serious threat to the community and had poor prospects for rehabilitation. In sum, petitioner's own actions, not those of the trial court, resulted in his having few "bargaining chips." [35]

---

[35] In his separate statement in the court of appeals, Judge Bazelon asserted that the district court improperly intruded into the plea bargaining process by announcing a "policy of differential sentencing" for those who cooperate and those

Amici finally argue that the district court's sentencing procedure gave rise to an improper appearance of "collusion" between judge and prosecutor (Amici Br. 36-37). However, the district court took no part in the plea negotiations. It did not take any action to coerce petitioner into cooperating, such as threatening petitioner prior to sentencing with an enhanced sentence if he withheld cooperation. It simply made a retrospective review of the evidence of petitioner's criminal conduct, his past record, and his past refusal to cooperate with the authorities in reaching a sentencing decision. Defense counsel and the prosecutor had an equal opportunity to allocute before the court. See Fed. R. Crim. P. 32(a)(1); ABA, *Minimum Standards for Criminal Justice: Sentencing Alternatives and Procedures, supra,* at § 5.3. As noted on pages 24-26, *supra*, the sentencing process requires the court to make this kind of inquiry, considering all pertinent evidence presented both by the prosecutor and defense counsel. In sum, the sentencing was entirely proper both procedurally and substantively, and there is no basis for disturbing petitioner's sentence on appeal.

---

who do not (Pet. App. 11a). In this regard, Judge Bazelon placed reliance on the court's prior decision in *Scott* v. *United States*, 419 F.2d 264 (D.C. Cir. 1969) (Pet. App. 8a, 11a). Three observations are pertinent in this connection. First, the district court did not announce any sentencing "policy." Rather, it examined all of the relevant facts involved in this particular case and imposed an appropriate sentence. Second, the *Scott* opinion has never received the approval of this Court. See *United States* v. *Grayson, supra,* 438 U.S. at 51-52. Finally, the decisions of this Court recognize the propriety of following a differential policy in sentencing those who cooperate and those who do not. See, *e.g., Corbitt* v. *New Jersey, supra,* 439 U.S. at 224 (footnote omitted), emphasizing the "constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

STEPHEN M. SHAPIRO
Assistant to the Solicitor General

JAMES R. DIFONZO
WADE S. LIVINGSTON
Attorneys

DECEMBER 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 807183 · 162

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1793

WINFIELD L. ROBERTS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL CAPITAL AREA CIVIL LIBERTIES UNION FOR LEAVE TO FILE, AND BRIEF *AMICI CURIAE*

CHARLES S. SIMS
BRUCE J. ENNIS, JR.
c/o American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Amici Curiae

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1793

Winfield L. Roberts,

Petitioner,

v.

United States of America,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

MOTION OF
THE AMERICAN CIVIL LIBERTIES UNION
AND THE NATIONAL CAPITAL AREA
CIVIL LIBERTIES UNION FOR LEAVE
TO FILE BRIEF AMICI CURIAE

The American Civil Liberties Union and the National Capital Area Civil Liberties Union respectfully move, pursuant to Rule 42, of this Court's Rules, for leave to file the within brief

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1793

Winfield L. Roberts,

Petitioner,

v.

United States of America,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

MOTION OF
THE AMERICAN CIVIL LIBERTIES UNION
AND THE NATIONAL CAPITAL AREA
CIVIL LIBERTIES UNION FOR LEAVE
TO FILE BRIEF AMICI CURIAE

The American Civil Liberties Union and the National Capital Area Civil Liberties Union respectfully move, pursuant to Rule 42, of this Court's Rules, for leave to file the within brief.

amici curiae. Although the Solicitor General has consented on behalf of the respondent to the filing of a brief amici curiae, counsel for petitioner has refused consent.*

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members, dedicated to defending and preserving the civil liberties guaranteed by the Constitution. The National Capital Area is its affiliate operating in the District of Columbia.

Central to the procedural safeguards secured by The Bill of Rights is the Fifth Amendment, whose requirement of due process and privilege against self-incrimination lie at the core of our adversarial criminal

---

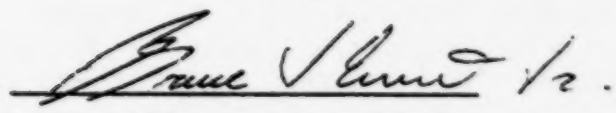
* Consent from the respondent is being lodged with the Clerk of the Court.

justice system. In our judgement, the decision below would significantly erode both of those Fifth Amendment rights.

The ACLU has frequently appeared in this Court arguing the continued vitality and importance of the Fifth Amendment rights at issue here, and we believe our experience can be of substantial assistance to the Court in this case. Moreover, we believe that this case can be resolved on a narrower ground than that presented by petitioner to the Court of Appeals, namely, that the trial court erred in drawing an inference of resistance to rehabilitation solely from the fact of non-cooperation.

To assist the Court's resolution of a case which again threatens crucial Fifth Amendment safeguards, we submit this brief amici curiae.

Respectfully submitted,



Bruce J. Ennis, Jr.
c/o American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorney for Amici Curiae

November 15, 1979

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

In The

SUPREME COURT OF THE UNITED STATES

No. 78-1793

Winfield L. Roberts,

Petitioner,

v.

United States of America,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL CAPITAL AREA CIVIL LIBERTIES UNION, Amici Curiae

---

Interest of Amici Curiae

The interest of Amici Curiae appears in the foregoing motion.

STATEMENT OF THE CASE

Amici adopt and rely on the Statement of the Case in the Petition for a Writ of Certiorari, at 2-6.

SUMMARY OF ARGUMENT

The Due Process Clause forbids sentencing on the basis of inaccurate facts or assumptions, or on the basis of factors that are arbitrary and unrelated to the goals of sentencing. Petitioner was sentenced on the basis of an inference of resistance to rehabilitation drawn by the sentencing judge solely because of petitioner's refusal to cooperate with the prosecutor. However, that refusal could be explained by several other factors, such as fear of retaliation or exercise of the privilege against self-incrimination, which are equally as probable as the inference drawn by the Court, and are not permissible factors for sentencing. Moreover, the Court made no effort to determine whether the inference it drew was a reasonable inference. Accordingly, the sentence in this case was arbitrary and capricious, and the case should be remanded for re-consideration of sentence. (Point I.)

Even if the inference of resistance to rehabilitation were a reasonable inference to draw on this record, however, consideration of petitioner's failure to cooperate as an aggravating and determinative factor in sentencing would be improper, because it would impermissibly penalize exercise of his Fifth Amendment privilege against self-incrimination. Petitioner cannot be penalized for having done what the Constitution permits him to do - refuse to incriminate himself unl ss granted immunity from use of that testimony. Penalizing petitioner for non-cooperation was unnecessary (the immunity statutes provide a Congressionally-sanctioned method of obtaining cooperation), and unduly burdened the exercise of his Fifth Amendment rights. (Point II.)

Finally, even if the Court declines to

recognize a constitutional rule preventing consideration of unexplained non-cooperation as an aggravating and determinative factor in sentencing, it should exercise its supervisory power to prohibit federal courts from relying on such non-cooperation. Federal policy prevents federal judges from participating in plea bargaining discussions. Judicial reliance on non-cooperation transforms the prosecutorial bargaining chip of immunity into a judicial sword of increased sentence, which provides an unfair advantage to the state and renders the plea bargaining process unequal and unfair. (Point III.)

I. BECAUSE PETITIONER'S UNWILLINGNESS TO BECOME A GOVERNMENT INFORMANT WAS NOT, OF ITSELF, PROBATIVE OF HIS PROSPECTS FOR REHABILITATION, ITS CONSIDERATION AS AN AGGRAVATING AND CONTROLLING FACTOR IN FIXING HIS SENTENCE WAS ARBITRARY AND IN VIOLATION OF DUE PROCESS.

In order to remand for re-consideration of sentence the Court need not rule that a convicted defendant's refusal to become an informant can never be considered as a factor, or even as a controlling factor, in deciding that the defendant's prospects for rehabilitation are poor, and that the sentence which would otherwise be imposed should therefore be increased. The Court need only rule that a refusal to become an informant cannot, of itself, justify a conclusive inference of poor rehabilitative prospects, unless the sentencing judge has considered and rejected other equally plausible reasons for the refusal.

In United States v. Grayson, 438 U.S. 41, 48 (1978), Chief Justice Burger, writing for the majority, noted that indeterminate sentencing power carries with it the possibility of arbitrary exercise of otherwise broad discretion:

> Indeterminate sentencing under the rehabilitation model present[s] sentencing judges with a serious practical problem: how rationally to make the required predictions so as to avoid capricious and arbitrary sentences, which the newly conferred and broad discretion place[s] within the realm of possibility.

Petitioner's sentence was arbitrarily increased upon consideration of a factor - his refusal to tell the prosecutor the name of his narcotics supplier - that is unrelated to any of the purposes for which indeterminate sentencing authority is to be used.

Operating on the premise that "the punishment should fit the offender and not merely the crime," United States v. Grayson, supra, at 45, quoting Williams v. New York, 337 U.S. 241, 247 (1949), the goal of sentencing is to determine the likelihood that the offender will be reformed and rehabilitated.[1/] United States v. Grayson, supra, at 51. Although judges have broad discretion in sentencing, see Williams v. New York,

---

1/ The gravity of the crime and the goal of deterrence are also factors to be considered in fixing sentence. However, the factor considered in this case, petitioner's refusal to supply information to the prosecutor, reflects on neither the gravity of the crime nor the concept of deterrence. The only remaining justification for considering that refusal as a factor is the possibility that it is probative of an individual's prospects for rehabilitation.

supra; United States v. Tucker, 404 U.S. 443, 46 (1972); Fed. R. Cr. P. 32(c)(2), that discretion is not without limits and is susceptible of abuse. 2/ See, e.g., Townsend v. Burke, 334 U.S. 736 (1948) (untrue assumptions concerning past criminal record improperly considered); United States v. Tucker, supra (consideration of convictions later determined to be constitutionally invalid); North Carolina v. Pearce, 395 U.S. 711 (1969) (exercise of the right to appeal

---

2/ Judge Frankel makes this point in Criminal Sentences: Law Without Order (1973):

> Correctly understood, the "discretion" of judicial officers in our system is not a blank check for arbitrary fiat. It is an authority, within the law, to weigh and appraise diverse factors (lawfully knowable factors) and make a responsible judgment, undoubtedly with a measure of latitude and finality varying according to the nature and scope of the discretion conferred. But "discretionary" does not mean "unappealable." Discretion may be abused, and discretionary decisions may be reversed for abuse.

Id. at 84.

is an improper consideration).

The record below demonstrates that the district judge relied on petitioner's failure to cooperate and become a government informant as the controlling factor in the decision to impose maximum consecutive four year sentences. 3/ That is not in dispute.

3/ That the judge considered petitioner's non-cooperation of controlling significance is borne out by the colloquy which occurred at petitioner's sentencing hearing. First, in response to petitioner's attorney's request that the court adhere to its virtually unvarying practice of imposing concurrent sentences on the two telephone counts to which he pled guilty, the government argued for consecutive sentences. Pet. 14a. Thereafter, the government conceded the extraordinary nature of its request, but justified it on the basis of petitioner's refusal to cooperate and become an informant. Pet. 15a, 18a. The court clearly relied upon the lack of cooperation in fixing the sentence; it acceded to the government's request by imposing consecutive sentences, and expressly adopted the government's basis for its request by reproving petitioner for not cooperating. Pet. 20a. Lack of cooperation is again cited as a con-

(FN 3 continued on next page)

In its Brief in Opposition, the government agrees that the question presented is whether petitioner's failure to cooperate was properly considered. Opposition at 1. The first question raised by that consideration, putting aside for the moment the significant constitutional question raised by this use of sentencing power to induce a waiver of petitioner's Fifth Amendment right to remain silent, (see Point II, infra) is whether petitioner's failure to cooperate was, of itself, probative of his resistance to reform and rehabilitation. Because there are several understandable explanations for that refusal which are unrelated to petitioner's rehabilitative prospects, and are equally as plausible as the "resistance to rehabilitation" explanation suddenly seized upon without evidentiary support by the judge

---

trolling factor in the district court's written memorandum denying bond pending appeal. Pet. 5.

and prosecutor, it was arbitrary for the court to infer from that refusal that petitioner was resistant to rehabilitation and therefore required the maximum sentence. 4/

4/ In the adjudicative context the Court has forbidden reliance on unreasonable inferences. At a minimum the Constitution requires a "rational connection between the fact proved and the ultimate fact presumed," a connection grounded in "common experience", and having "a reasonable relation to the circumstances of life as we know them." Tot v. United States, 319 U.S. 463, 67-8 (1943). See generally Leary v. United States, 395 U.S. 6, 36 (1969) (a presumption is irrational or arbitrary and hence unconstitutional unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact on which it is made to depend); County Clerk of Ulster County New York, v. Allen, No. 77-1554, 47 U.S.L.W. 4618, 24 (June 4, 1979) (same). Although somewhat different standards may apply to the admissibility of "evidence" in the sentencing phase, certainly due process requires at a minimum that a fact from which an inference of lack of rehabilitative desire is drawn be more likely than not probative of the existence of lack of rehabilitative desire. Nothing in the cases recognizing broad sentencing discretion for federal judges was intended to sanction arbitrary sentencing.

First, as other courts have recognized, by revealing the name of a narcotics supplier, the supplier's co-conspirators and the details of any conspiracies they are involved in, see Pet. 16a, petitioner would incur a serious risk of physical retaliation.5/

5/ See, e.g., DiGiovanni v. United States, 596 F.2d 74, 75 (2d Cir. 1979)("refusal to testify, particularly in narcotics cases, is more likely to be the result of well-founded fears of reprisal to the witness or his family"); United States v. Ramos, 572 F. 2d 360 (2d Cir. 1978)(fear of reprisal was the stated reason for refusing to cooperate). Judge Bazelon, dissenting below from the denial of rehearing en banc, observed that petitioner here had "cooperate[d] by inculpating both himself and his co-conspirator. [He] balked only when asked to identify his powerful suppliers, fearing that to do so would endanger his life. . ." Pet. 7a.

Both the Court and Congress have recognized the critical need for maintaining the anonymity of informers, precisely because of the substantial risk of physical retaliation to the informer and his family. See, e.g., McCray v. Illinois, 386 U.S. 300 (1967); Sher v. United States, 305 U.S. 251 (1938); Organized Crime Control Act of 1970, P.L. 91-452, 84 Stat. 922, §§ 501 et. seq (1970) (Witness Protection Program). 6/

6/ See also Hearings on the Witness Protection Program before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 95th Cong., 1st Sess., March 23, 1978.

Surely even the sternest judge of human nature would not test "rehabilitative desire" by demanding that a defendant become an informant where a concomittant of such action is a substantial risk to the informant and his family of retaliatory injury.

Refusal to become an informant may also result from an understandable desire, and constitutionally protected right, to refrain from giving the prosecutor information which may give rise to additional charges. See Malloy v. Hogan, 378 U.S. 1, 11 (1964). The prosecutor had not granted immunity, and petitioner had substantial reason to fear that the prosecutor intended to use whatever information cooperation might yield to bring additional charges against him. A defendant's exercise of rights secured by the Bill of Rights can hardly be considered

probative of resistance to rehabilitation or any other factor warranting increased sentence. Indeed, the Court has previously ruled that exercise of a different Fifth Amendment right is an impermissible consideration in sentencing. North Carolina v. Pearce, supra.

Even those courts permitting consideration of a failure to cooperate as evidence of poor rehabilitative prospects have generally done so only where the record showed that several other factors supported the inference, making it more probable than not. For example, in United States v. Miller, 589 F. 2d 1117, (1st Cir. 1978), cert. denied No. 78-966 (March 19, 1979), the First Circuit upheld the inference, but specifically reserved the case where, as here, nothing in the record or noted by the sentencing judge supported the inference that resistance to rehabilitation

was a more probable explanation for the failure to cooperate than were alternative explanations. Id. at 1137 n.18, 1139. See also United States v. Barnes, 604 F.2d 121 (2d Cir. 1979) (all factors bearing on a particular situation must be considered).7/

The government suggests that this case is governed by United States v. Grayson, supra, and that petitioner's refusal to cooperate is comparable to Grayson's perjury at trial. Opposition at 3. Willingness to lie at trial

---

7/ In a related context the Court has determined that a defendant's motivation in refusing to give information after arrest is so "insolubly ambiguous" that it is "of little probative force" and cannot, of itself, be used to impeach his exculpatory testimony at trial. See United States v. Hale, 422 U.S. 171, 176 (1975); Doyle v. Ohio, 426 U.S. 610, 617 (1976). A refusal to become an informant is, of itself, no less ambiguous than post-arrest silence. Thus, it is no more probative of poor rehabilitative prospects than post-arrest silence is probative of guilt.

may be highly probative of a defendant's willingness to transgress further, and accordingly of rehabilitative prospects. United States v. Grayson, supra, at 50. The existence of past crimes may also be probative of future conduct. Williams v. New York, supra. But failure to cooperate, by itself, like materially false assumptions, tells a sentencing judge nothing about an individual's rehabilitative prospects and is therefore an arbitrary, inappropriate, and constitutionally impermissible basis for determining the period of incarceration necessary for rehabilitation. See Townsend v. Burke, supra, at 741 (sentencing based on materially false assumptions is impermissible); United States v. Tucker, supra (resentencing required to ensure that sentence would not have been different if court had known that

prior convictions were constitutionally invalid).

This Court has increasingly recognized the importance of sentencing, e.g., Mempha v. Rhay, 389 U.S. 128 (1967); Specht v. Patterson, 386 U.S. 605 (1967), and particularly the importance of the accuracy of information used at sentencing. E.g., Williams v. New York, supra, at 244 (noting that the accuracy of the information relied upon was not challenged); Townsend v. Burke, supra, (sentencing on basis of untrue assumtions violates due process); Gardner v. Florida, 430 U.S. 349, 362 (1977) (imposition of death penalty on basis of information contained in a confidential pre-sentencing report improperly denied the opportunity to challenge the accuracy or materiality of the information).

The sentence at issue here, based on an inaccurate and improbable inference, is arbitrary and capricious, in violation of the Due Process Clause. Accordingly, consideration of petitioner's failure to become an informant as an aggravating and controlling factor in fixing his sentence requires a remand for resentencing. 8/

8/ Amici do not object to reliance on cooperation as a mitigating factor in sentencing. "It is one thing to extend leniency to a defendant who is willing to cooperate with the government, it is quite another thing to administer additional punishment to a defendant who by his silence has committed no additional offense." DiGiovanni v. United States, supra n.5, at 75, quoting from United States v. Ramos, supra n.5, at 363 n.2. Cf. Corbitt v. New Jersey, 439 U.S. 212 (1978) (extension of leniency in response to guilty plea does not violate the Constitution).

Petitioner should be resentenced under criteria relevant to his prospects for rehabilitation and reform, and not according to arbitrary criteria whose consideration is violative of the Due Process Clause. At a minimum, failure to cooperate should be an impermissible consideration unless the sentencing judge examines the reasons for not cooperating in order to determine whether failure to cooperate is indicative of resistance to reform or is the result of some other unblameworthy consideration, such as fear of reprisal, and to make a record for review on appeal. See DiGiovanni v. United States, supra n.5, at 78 (concurring opinion).

II. THE USE OF PETITIONER'S REFUSAL TO SUPPLY INFORMATION TO THE PROSECUTOR AS AN AGGRAVATING FACTOR IN FIXING HIS SENTENCE UNCONSTITUTIONALLY PENALIZED EXERCISE OF HIS FIFTH AMENDMENT PRIVILEGE.

Even if petitioner's refusal to supply information to the prosecutor could, of itself, be deemed probative of his prospects for rehabilitation, reliance on that refusal in fixing sentence would impermissibly penalize exercise of his constitutional right to remain silent.

Unlike United States v. Grayson, supra, where defendant had abused his constitutional privilege to testify in his own behalf by lying during his testmony, petitioner has simply used his Fifth Amendment privilege to remain silent. The basis for the prosecutor's unusual sentencing request was petitioner's refusal "to identify the persons

from whom he was getting the drugs, and the location, and to lay out the conspiracy and identify other co-conspirators who were involved with them." Pet. 16a. Because the prosecutor never extended immunity, there was no guarantee petitioner would not subsequently be indicted for other acts not encompassed in the plea agreement but revealed in answer to the prosecutor's questions. At least absent a grant of immunity, petitioner clearly had a constitutionally

protected right under the Fifth Amendment to refuse to "cooperate". 9/

9/ The Federal Immunity Statutes offer a means of securing cooperation other than by involving the judge in considering non-cooperation as an aggravating factor in sentencing. See 18 U.S.C. §§ 6001 et seq. (1976). In view of the prosecutor's determination not to offer immunity in this case (a failure by the government to avail itself of the congressionally indicated means of securing cooperation), a significant question is raised as to whether a judge may circumvent the purpose of this legislation by attempting to secure cooperation through sentence enhancement. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) (where Congress has indicated a means of dealing with a problem, the Court should be reluctant to condone the use of other non-statutory means of obtaining the same end).

Accordingly, the sentencing judge's express reliance on petitioner's refusal to answer this question as a controlling factor in determining sentence constituted the imposition of a penalty on petitioner for refusal to waive his Fifth Amendment rights. 10/ That penalty is inconsistent with holdings of this Court that exercise of the right to remain silent cannot be penalized. See

---

10/ See DiGiovanni v. United States, supra n.5, at 75 ("while it is true that a defendant's lack of desire for rehabilitation may properly be considered in imposing sentence, to permit the sentencing judge to infer such lack of desire from a defendant's refusal to provide testimony would leave little force to the rule that a defendant may not be punished for exercising his right to remain silent"); United States v. Garcia, 544 F.2d 681, 685 (3d Cir. 1976) (consideration of refusal to supply information as a factor in sentencing put an impermissible "price tag" on exercise of the Fifth Amendment privilege); United States v. Rogers, 504 F.2d 1079, 84-5 (5th Cir. 1974) (same), cert. denied, 422 U.S. 1042 (1975).

Garrity v. New Jersey, 385 U.S. 493 (1967); Slochower v. Board of Education, 350 U.S. 551 (1956); Spevack v. Klein, 385 U.S. 511 (1967); Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, supra; Counselman v. Hitchcock, 142 U.S. 547 (1892); Gardner v. Broderick, 392 U.S. 273 (1968).

The Fifth Amendment privilege precludes the use of design or device to compel incriminating disclosures. See Miranda v. Arizona, 384 U.S. 436, 442-3 (1966). It guarantees the right to remain silent until an individual chooses to speak in the "unfettered exercise of his own will..." Malloy v. Hogan, supra, at 11. Thus, the Constitution forbids a prosecutor from commenting on a defendant's silence at trial. Griffin v. California, supra. And a defendant's post-arrest silence may not be used to impeach his exculpatory testimony

at trial. Doyle v. Ohio, supra n. 7. It follows, a fortiori, that the constitutional guarantee forbids a judge from increasing the sentence that would otherwise be imposed because of defendant's exercise of the right to remain silent, because the threat of an enhanced sentence is even more burdensome than these other pressures on the exercise of the Fifth Amendment right. If the two-fold increase in petitioner's sentence - from one to four years to two to eight years - is the result of his having done what the Fifth Amendment plainly allows, then petitioner has been the victim of an "inquisitorial system of criminal justice" in violation of the Fifth Amendment. Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964). The threat of increased sentence for non-cooperation impermissibly "fetters" exercise of the Fifth Amendment right by "making

its assertion costly. Griffin v. California, supra, at 614. It is therefore unconstitutional.

Although pressures which raise only a remote and de minimis possibility of discouraging the exercise of constitutional rights are not necessarily unconstitutional, see, e.g., Colten v. Kentucky, 407 U.S. 104 (1972) (risk of increased penalty at de novo trial in two-tier adjudicatory system does not violate due process); Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (imposition of higher sentence by jury after appeal and retrial does not offend due process); Corbitt v. New Jersey, supra n.8 (statutory scheme requiring life imprisonment if convicted of first-degree murder after trial, with possibility of lesser penalty upon plea of non vult, not violative of due process); Bordenkircher v. Hayes, 434 U.S. 357 (1978) (plea bargaining does not violate due process), if such pressures are likely to deter exercise of a

constitutional right, they are unconstitutional as an undue and unreasonable burden on the exercise of constitutional rights. Blackledge v. Perry, 417 U.S.21, 28 (1974) (indictment for higher charge on appeal in a two-tier system unconstitutionally deters exercise of the right to appeal); North Carolina v. Pearce, supra, at 724-5 (higher sentence after appeal and retrial, without indication of new facts to justify it, unconstitutionally chills exercise of the right to appeal). Moreover, where a particular form of pressure is unnecessary, it is excessive and therefore unconstitutional. United States v. Jackson, 390 U.S. 570, 582 (1968) (statutory scheme permitting death penalty only after jury trial unnecessarily penalized exercise of jury right). Cf. Corbitt v. New Jersey, supra n.8 (upholding penalty scheme which serves state interest in facilitating plea

bargaining without significantly deterring exercise of the right to plead not guilty). In this case the practice is both unnecessary and unreasonably burdensome on the exercise of one's right to remain silent.

That it is unnecessary is apparent from the variety of alternative indicia of an individual's prospects for rehabilitation available to the sentencing judge. See Williams v. New York, supra; Fed. R. Crim. P. 32(c)(2). See also "Guideline Evaluation Worksheet," 38 Fed. Reg. 31915 (1973) (factors to be considered before parole release). Family and work history, record of past convictions, psychological reports and demeanor all shed light on an individual's "life, health, habits, conduct and mental and moral propensities." Williams v. New York, supra, at 245. In view of the weak probative link between a failure to cooperate and resistance to rehabilitation, and in view of

the alternative valid indicia available, consideration of refusal to cooperate, at least in the absence of further exploration of the reasons for that refusal, is unnecessary. Like other governmental objectives, the goal of individualized sentencing "cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." See United States v. Jackson, supra, at 582; United States v. Robel, 389 U.S. 258 (1967); Shelton v. Tucker, 364 U.S. 479 (1960).

III. EVEN IF IT DECLINES TO STRIKE DOWN THE PRACTICE ON CONSTITUTIONAL GROUNDS, THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO PROHIBIT FEDERAL COURTS FROM CONSIDERING NON-COOPERATION WITH THE PROSECUTOR, OF ITSELF, AS A DETERMINATIVE FACTOR IN FIXING A SENTENCE.

Apart from the strong constitutional claims advanced here, this case also presents an appropriate occasion for the exercise of this Court's supervisory power to establish standards of procedure for the federal courts. See McNabb v. United States 318 U.S. 332, 340 (1943); Cheff v. Schnackenberg, 384 U.S. 373 (1966).[11/] Supervisory power should be exercised here for two reasons. First, judicial consideration of a defendant's refusal

---

11/ See generally Hill, "The Bill of Rights and the Supervisory Power," 69 Col. L. R. 193 (1969); Note, "The Judge-Made Supervisory Power of the Federal Courts," 53 Geo. L. J. 1050 (1965); Note, "The Supervisory Power of the Federal Courts," 76 Harv. L. Rev. 1656 (1963).

to cooperate constitutes sub rosa participation by the judge in the plea bargaining process forbidden by the strong policy of federal courts against such participation. Second, it gives an appearance of collusion between prosecutor and judge which taints both the public's and the defendant's belief in the fairness of the judicial process. Accordingly, even if the Court declines to rule, on constitutional grounds, that unexplained refusal to cooperate cannot be considered at sentencing, the Court should nevertheless formulate that rule for federal courts as a matter of supervisory power.

A. Judicial Participation in Plea Bargaining.

The Court has sustained plea bargaining against claims of illegality and improper administration on the rationale that a relative equality of bargaining power between prosecutor and defendant ensures its fairness.

See, e.g., Bordenkircher v. Hayes, supra, at 362; Santobello v. New York, 404 U.S. 257, 261 (1971); Brady v. United States, 397 U.S. 742, 751 n.8 (1970); Parker v. North Carolina, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting). In order to maintain this balance, federal judges are forbidden from participating in plea bargaining. See Fed. R. Crim. P. 11(e)(1) ("The court shall not participate in any such [plea agreement] discussions"); ABA Standards Relating to Pleas of Guilty § 3.3(a) (Approved Draft, 1968), cited in Adv. Comm. Notes to Rule 11(e)(1), 18 U.S.C. §11, at 25; Scott v. United States, 419 F.2d 264, 273-4 (D.C. Cir. 1969) (trial judge should neither participate in plea bargaining nor create incentives for guilty pleas by a policy of differential sentencing). Judge Weinfeld has characterized the problem raised by judicial influence in the plea bargaining process as "a question of fundamental fairness":

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not.

United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966).

A defendant's ability to bargain is severely circumscribed if the courts consider non-cooperation as an aggravating factor justifying an enhanced sentence. The prosecutor need not offer as much for defendant's cooperation if the judge will consider any failure to cooperate as an aggravating factor justifying increased sentence. And defendant must accept less because the appearance of non-cooperativeness will be held against him by the judge in the sentencing phase.

Moreover, consideration of a refusal to supply the prosecution with information as an aggravating sentencing factor significantly distorts the plea bargaining process by eliminating the need for the prosecutor to trade immunity for the defendant's testimony, as this case shows. But Congress has determined that an offer of immunity by the prosecutor, not the prospect of increased sentence by the judge, is the appropriate way to secure testimony in the face of a valid Fifth Amendment claim.[12/] In addition, by acceding to the prosecutor's demand for an increased sentence because of petitioner's failure to cooperate, the judge rendered meaningless petitioner's agreement to plead guilty to specified charges in return for the dismissal of others, because the sentence was based upon defendant's refusal to

---

12/ See supra n. 9.

provide information rather than upon the charges to which he pled guilty. The judge's action removed both of petitioner's "bargaining chips" - the ability to trade a plea of guilty in return for fewer charges, and the ability to trade testimony for a grant of immunity. Because this destruction of a defendant's bargaining power destroys the "mutuality of advantage" necessary to sustain plea bargaining against claims of unconstitutionality and unfairness, Bordenkircher v. Hayes, supra, at 362, the supervisory power should be exercised to prohibit a judge from considering a defendant's failure to cooperate with the prosecutor as a controlling factor in imposing sentence.

B. Appearance of Collusion Between Judge and Prosecutor.

Consideration of the failure to cooperate as an aggravating factor also gives the appear-

ance of collusion between prosecutor and judge in securing defendant's cooperation, contrary to the policy of Rule 11. The spectacle of the judge, wielding the sword of a threatened enhanced sentence against reluctant defendants, is at odds with the adversarial system, in which the judge should be a referee between parties of relatively equal bargaining power.

This Court's supervisory power is appropriately exercised to preserve fairness and the appearance of fairness in the judicial process. See, e.g., Mesarosh v. United States, 352 U.S. 1, 14 (1956); Note, "The Supervisory Power of the Federal Courts," 76 Harv. L. Rev. 1656, 59 (1963). The potential for unfairness and the appearance of unfairness arising out of the practice at issue here makes this an appropriate occasion for the exercise of supervisory authority to prescribe standards of procedure for the federal courts.

CONCLUSION

For the foregoing reasons, the judgement below should be vacated, and the case remanded for re-consideration of sentence.

Respectfully submitted,

CHARLES S. SIMS
BRUCE J. ENNIS, JR.
c/o American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Amici Curiae*

---

*Counsel wish to acknowledge the substantial assistance of Jed Ringel, a third year law student at New York University School of Law, in the research and preparation of this brief.